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WYOMING REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

WYOMING

FROM

JUNE 10, 1907, TO MAY 12, 1908

REPORTED BY

CHARLES N. POTTER

0

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MAR 23 1909

JUSTICES OF THE SUPREME COURT OF THE STATE OF WYOMING

DURING THE PERIOD COVERED BY THIS VOLUME.

CHARLES N. POTTER, *Chief Justice.*

CYRUS BEARD, *Justice.*

RICHARD H. SCOTT, *Justice.*

Clerk, WILLIAM H. KELLY.

Attorney General, WILLIAM E. MULLEN.

DISTRICT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

First District, RODERICK N. MATSON, *Cheyenne.*

Second District, CHARLES E. CARPENTER, *Laramie.*

Third District, DAVID H. CRAIG, *Rawlins.*

Fourth District, CARROLL H. PARMELEE, *Buffalo.*

CASES REPORTED.

Blake; Matthews v.....	116
Boswell v. First National Bank of Laramie.....	161
Brown et al. v. Grady.....	151
Burgess; Littleton et al. v.....	58
Byers v. Solier, Superintendent of the State Hospital for the Insane	232
Chicago, Burlington & Quincy Railroad Company v. Morris.....	308
Chicago, Burlington & Quincy Railroad Company v. Pollock....	321
City of Rawlins v. Jungquist.....	403
Clause, Administrator, &c., v. Columbia Savings & Loan Association	450
Columbia Savings & Loan Association; Clause, Administrator, &c., v.....	450
District Court of Carbon County; Keefe et al. v.....	381
Duxstad v. Duxstad.....	396
Field et al. v. Leiter et al.....	1
First National Bank of Laramie; Boswell v.....	161
Grady; Brown et al. v.....	151
Greenawalt et al. v. Natrona Improvement Company.....	226
Horton et al.; Riordan et al. v.....	363
Hovey v. Sheffner, Sheriff.....	254
Johnson County Savings Bank; Small v.....	126
Jungquist; City of Rawlins v.....	403
Keefe et al. v. District Court of Carbon County.....	381
Knott; Mayott et al. v.....	108
Krause v. Matthews.....	140
Leiter et al.; Field et al. v.....	1
Littleton et al. v. Burgess.....	58
Maika et al.; Union Stockyards National Bank v.....	141
Matthews v. Blake.....	116
Matthews; Krause v.....	140
Mayott et al. v. Knott.....	108
McGinnis v. State.....	72
Morris; Chicago, Burlington & Quincy Railroad Company v....	308

Natrona Improvement Company; Greenawalt et al. v.....	226
Pollock; Chicago, Burlington & Quincy Railroad Company v....	321
Porter v. State.....	131
Pressler; State v.....	214
Primm; Weidenhoft et al. v.....	340
Richter v. State.....	437
Riordan et al. v. Horton et al.....	363
Ross v. State.....	285
Schnitger, Secretary of State; State ex rel. Sullivan et al. v....	479
Sheffner, Sheriff; Hovey v.....	254
Small v. Johnson County Savings Bank.....	126
Solier, Superintendent of the State Hospital for the Insane; Byers v.....	232
State v. Pressler.....	214
State; McGinnis v.....	72
State; Porter v.....	131
State; Richter v.....	437
State; Ross v.....	285
State ex rel. Sullivan et al. v. Schnitger, Secretary of State....	479
Union Stockyards National Bank v. Maika et al.....	141
Weidenhoft et al. v. Primm.....	340

CASES CITED.

WYOMING CASES.

Bandy v. Hehn, 12 Wyo., 289.....	265, 266
Bank v. Ludvigsen, 8 Wyo., 230.....	307
Board v. Perkins, 5 Wyo., 166.....	538
Boburg v. Prah, 3 Wyo., 325.....	319
Boswell v. Blieler, 9 Wyo., 277.....	307, 376
Boulter v. State, 6 Wyo., 66.....	307
Brantley v. State, 9 Wyo., 102.....	305
Bryant v. State, 5 Wyo., 376.....	294
Bryant v. State, 7 Wyo., 311.....	306
Bunce v. McMahon, 6 Wyo., 24.....	195, 196
Casteel v. State, 9 Wyo., 267.....	307
Col. S. & L. Ass'n v. Clause, 13 Wyo., 166.....	148
Comm'rs v. Shaffner, 10 Wyo., 181.....	370
Conrad v. Lepper, 13 Wyo., 473.....	372
Cook v. Bank, 12 Wyo., 492.....	205
Cook v. Bank, 13 Wyo., 187.....	129
Cowhick v. Shingle, 5 Wyo., 87.....	148
Cronkhite v. Bothwell, 3 Wyo., 739.....	129
Delaney v. State, 14 Wyo., 1.....	307
Ex parte Bergman, 3 Wyo., 393.....	135
First Nat. Bank v. Cit. Nat. Bank, 11 Wyo., 32.....	181
Fisher v. McDaniel, 9 Wyo., 457.....	265
Harden v. Card, 14 Wyo., 479.....	229, 349
Hogan v. Peterson, 8 Wyo., 549.....	230, 307
Hollibaugh et al. v. Hehn, 13 Wyo., 269.....	265
Horn v. State, 12 Wyo., 80.....	307, 376
In re McDonald, 4 Wyo., 150.....	265, 266
Kahn v. Ins. Co., 4 Wyo., 419.....	202
Kingen v. Kelley, 3 Wyo., 566.....	265, 266
Koppala v. State, 15 Wyo., 398.....	307
Kuhn v. McKay, 7 Wyo., 42.....	329
Laramie Nat. Bank v. Steinhoff, 7 Wyo., 464.....	134, 136
Lellman v. Mills, 15 Wyo., 149.....	179
Littleton v. Burgess, 14 Wyo., 173.....	67

Marks v. Board, 11 Wyo., 488.....	148
Mau v. Stoner, 14 Wyo., 183.....	354
McCarthy v. Territory, 1 Wyo., 313.....	82
Menardi v. O'Malley, 3 Wyo., 327.....	230
Miskimmins v. Shaver, 8 Wyo., 408.....	265, 266
North Platte M. Co. v. Price, 4 Wyo., 293.....	230
Perkins v. McDowell, 3 Wyo., 328.....	63
Phillips v. Brill et al, 15 Wyo., 521.....	130
Riner v. N. H. Ins. Co., 9 Wyo., 81, 445.....	202
Robertson v. Shorow & Co., 10 Wyo., 368.....	129
Schlesinger v. Cook, 9 Wyo., 256.....	193
Sheehan v. Ditch Co., 12 Wyo., 176.....	129
State ex rel. v. Ausherman, 11 Wyo., 410.....	354
State ex rel. v. Barber, 4 Wyo., 56.....	515
State ex rel. v. Blake, 5 Wyo., 107.....	81
Thomas et al. v. Schmitz, 15 Wyo., 181, 87 Pac., 996.....	179, 180
Todd et al. v. Peterson, 13 Wyo., 513.....	307
Trumbull v. Territory, 3 Wyo., 280.....	223
Turner v. Hamilton, 10 Wyo., 177.....	230
Tway v. State, 7 Wyo., 74.....	103, 298
Ullman v. Abbott et al., 10 Wyo., 97.....	359
U. P. R. R. Co. v. U. S., 2 Wyo., 170.....	208
Wilber v. Territory, 3 Wyo., 268.....	82, 103
Wilson v. O'Brien, 1 Wyo., 42.....	307
Wolcott v. Bachman, 3 Wyo., 335.....	307, 371

OTHER CASES.

Adams v. Bosworth, 102 S. W., 861.....	543
Adams v. Buchanan, 49 Mo., 64.....	124
Adams v. Clive, 57 Ala., 249.....	67
Addison v. People, 193 Ill., 405.....	297
Adkinson v. Gahan, 114 Ill., 21.....	114
Advance Mfg. Co. v. Auch, 25 Ind. App., 687, 58 N. E. 1062.....	231
Aldrich v. Super. Ct., 52 Pac., 148.....	241
Angier v. Schieffelin, 72 Pa. St., 106.....	182
Armstrong v. Hufty, 156 Ind., 606.....	123
Arnold v. Bunnell, 42 W. Va., 473.....	39
Arnold v. Chesebrough, 46 Fed., 700.....	360, 361
Attorney General v. N. A. Life Ins. Co., 89 N. Y., 94.....	378

CASES CITED.

ix

Babb v. Aldrich, 25 Pac., 558.....	209
Bacon v. Lawrence, 26 Ill., 53.....	114
Badger v. Badger, 88 N. Y., 546.....	360
Baldwin v. Bank, 1 O. St., 141.....	432
Bales v. State, 58 Ark., 35.....	79
Bank v. Hove, 45 Minn., 40.....	182
Bank of Topeka v. Clark, (Kan.) 77 Pac., 92.....	470
Barnum v. Barnum, 42 Md., 251.....	360, 361
Bender v. Markle, 37 Mo. App., 234.....	150
Benjamin v. State, 121 Ala., 26.....	81
Bentley v. Long Dock Co., 14 N. J. Eq., 480.....	50
Benton v. Holland 58 Vt., 533.....	150
Bergman v. Bly, 66 Fed., 40.....	148
Betts v. Chi. &c. R. Co., 92 Ia., 343.....	320
Biddle v. Biddle, 117 Mich., 28.....	39
Bise v. U. S., 144 Fed., 374.....	98
Blanton v. Bostic, 126 N. C., 418.....	182
Blair v. Lynch, 105 N. Y., 636.....	151
Blyth v. Ayres, 102 Cal., 254.....	353
Board v. Blacker, 92 Mich., 638.....	522
Board v. Fraser, 19 Ind. App., 520.....	231
Boles v. State, 58 Ark., 35.....	100
Boley v. Griswold, 20 Wall., 486.....	209
Bowles v. State, (5 Sneed's Rep.) 37 Tenn., 360.....	393
Bowman v. Ogden City, 93 Pac., 561.....	418, 419, 420
Brachtendorf v. Kehm, 72 Ill. App., 228.....	231
Breeze v. Haley, (Colo.) 59 Pac., 333.....	66, 67
Brick v. Plymouth County, 63 Ia., 462.....	420, 421, 426
Brinker v. Ry. Co., 11 Colo. App., 166.....	125
Brinkley v. Brinkley, 50 N. Y., 184.....	360
Brouillette v. Judge, 45 La. Ann., 243.....	395
Brown v. Coitchell, 110 Ind., 31; 7 N. E., 888.....	71
Brown v. State, 6 Baxt., 422.....	297
Bruner v. Super. Ct., 92 Cal., 239.....	395
Buckingham v. Buckingham, 36 O. St., 69.....	71
Burke v. Interstate Ass'n. (Mont.) 64 Pac., 879.....	469
Campbell v. Baldwin, 130 Mass., 199.....	150, 151
Campton v. State, 140 Ind., 442.....	106
Carper v. State, 27 O. St., 572.....	105
Cartledge v. Sloan, 124 Ala., 506.....	113
Cartwright v. McGown, 121 Ill., 388; 2 Am. St., 105.....	360
C. B. & Q. Ry. Co. v. Powers, 103 N. W., 678.....	334
C. B. & Q. Ry. Co. v. Williams, (Neb.) 85 N. W. 832, 55 L. R. A., 289.....	336

Central Branch R. R. Co. v. Andrews, 21 Kan., 702.....	424
Central of Ga. R. Co. v. Jaines, 117 Ga., 832.....	320
Chafee v. Chafee, 14 Mich., 276.....	402
Chandler v. State, 141 Ind., 106.....	99
Chase v. Whiting, 30 Wis., 544.....	189
Chicago & R. Co. v. Harmon, 12 Ill. App., 54.....	318
Chicago & R. Co. v. Sullivan, 80 S. W., 791.....	69
City of Lafayette v. Nagle, 113 Ind., 425.....	424
City of Vernon v. Voegler, 103 Ind., 314.....	424
Clardy v. Richardson, 24 Mo., 295.....	185
Clark v. Boyd, 2 O., 56.....	184
Clark v. Buchanan, 2 Minn., 346.....	520
Clayton v. Wardell, 4 N. Y., 230.....	360
Clement v. U. S., 149 Fed., 305.....	88
Clemons v. State, 92 Tenn., 282.....	79
Cleveland &c. R. Co. v. Heath, 22 Ind. App., 47, 53 N. E., 198.....	316
Cliver v. State, 45 N. J. L., 46.....	297
Coles v. Shepard, 30 Minn., 446.....	359
Columbia &c. Ass'n. v. Jungquist, 111 Fed., 645.....	463
Columbia Ass'n. v. Lyttle, 16 Colo. App., 423.....	463
Com. v. Biddle, 218 Pa., 234.....	542
Com. v. Norton, 8 S. & R., 72.....	279, 280
Com. v. Roosnel, 143 Mass., 32; 8 N. E., 747.....	297
Com. v. Thompson, 116 Mass., 349.....	304
Com. v. Trimmer et al., 84 Pa., 65.....	422
Commonwealth v. Clifford, 8 Cush. (62 Mass.), 215.....	79
Comm'rs. v. Seawell, 3 Okla., 281.....	420
Concordia &c. Ass'n. v. Read, 93 N. Y., 474.....	475
Cook v. Ansonia, 66 Conn., 413.....	419
Coulter v. Stafford, 56 Fed., 564.....	125
Craig v. State, 157 Ind., 574.....	99
Creek v. McManus, 13 Mont., 152; (32 Pac., 675).....	70
Cribbin v. Jarvis et al., 67 Pac. 531.....	359
Crisler v. Morrison, 57 Miss., 791.....	395
Croomes v. State, 40 Tex. Cr. Rep., 672; 51 S. W., 924.....	296, 297, 301
Cumberland C. & I. Co., v. Hoffman, S. C. Co., 39 Barb. 16.	68
Curtis v. Osborne, 60 Neb., 708.....	230
Cutler v. Hurlbut, 29 Wis., 152.....	125
Dale et al. v. Thomas et al., 67 Ind., 570.....	72
Davis v. Miller Signal Co., 105 Ill. App., 657.....	520
Davis v. Turner, 69 O. St., 101.....	320
Davis v. Williams, 121 Ala., 542; 25 So., 704.....	231

Day v. Day, 84 Ia., 221.....	402
Debolt v. Carter, 31 Ind., 355.....	72
Denny v. State ex rel. Basler, 144 Ind., 503.....	522
Denver L. S. Com. Co. v. Parks, 91 Pac., 1110.....	196
Desshong v. Desshong, 186 Pa. St., 227.....	37
Disborough v. Disborough, 51 N. J. Eq., 306.....	402
Drovers Nat. Bank v. Potvin, 116 Mich., 474.....	204
Dunlap v. Henry, 76 Mo., 106.....	123
Eaton v. Chapin, 7 R. I., 408.....	470
Eden Musee Co. v. Yohe, 32 Neb., 452.....	114
Eisner v. Curiel, 2 App. Div. (N. Y.), 522.....	39
Elsner v. Shirlgley, 45 N. W., 393.....	266
Ex parte Bedard, 106 Mo., 616.....	276
Ex parte Bennett, 51 Ark., 215.....	279, 280
Ex parte Bigelow, 113 U. S., 328.....	271
Ex parte Crofford, (Tex. Cr. App.) 47 S. W., 533.....	276
Ex parte Davis, 89 S. W., 978.....	277
Ex parte Glenn, 111 Fed., 257.....	280
Ex parte Goldman, 88 Pac., 819.....	105
Ex parte Harding, 120 U. S., 782.....	269
Ex parte Hartman, 44 Cal., 32.....	277
Ex parte Lange, 18 Wall., 163.....	282
Ex parte Maxwell, 11 Nev., 428.....	275
Ex parte McLaughlin, 41 Cal., 211.....	277
Ex parte Ruthven, 17 Mo., 541.....	276
Ex parte Snyder, 29 Mo. App., 256.....	276
Ex parte Ulrich, 43 Fed., 661.....	272
Ex parte White, 15 Nev., 146.....	283
Fair v. Bank, 70 Kan., 612.....	212
Farrell v. Cook, 16 Neb., 483.....	72
Farrell v. State, 54 N. J. L. 416; 24 Atl., 723.....	297
Fizell v. State, 25 Wis., 364.....	297
Friend v. Friend, 65 Wis., 412.....	402
Fry v. Shafor, 164 Ind., 699.....	192
Fulton v. Monona County, 47 Ia., 622.....	421, 429
Gabe v. Root, 93 Ind., 256.....	122
Gay v. Davey, 47 O. St., 396.....	436
Gibbs v. Cook, 4 Bibb, 535.....	185
Gibson v. Lowndes, 28 S. Car., 285.....	150
Gibson v. Nat. S. S. Co., 8 Misc. Rep. N. Y. Super. Ct., 22.....	318
Giddings v. Blacker, 93 Mich., 1.....	522
Gillespie v. Rump, 72 N. E., 138.....	274, 275
Goldsmith v. Goldsmith, 6 Mich., 285.....	401

Gomer v. Chaffee, 6 Colo., 314.....	125
Goodykoontz v. Olson, 54 Ia., 175.....	123
Gordon v. Little, 41 Neb., 250; 59 N. W., 738.....	230
Grant v. Grant, 5 S. Dak., 1; 57 N. W., 1130.....	402
Greenberg v. Stevens, 212 Ill., 606.....	196
Gresh's case, 12 Pa. Co. Ct., 295.....	251
Grever v. Taylor, 53 O. St., 621.....	193
Gue v. Jones, 25 Neb., 634.....	122
Gulf &c. Ry. Co. v. Trawick, 80 Tex., 270.....	315
Hadley v. Cross, 34 Vt., 586 (80 Am. Dec. 699).....	37
Hager v. DeGroat, 3 N. Dak., 354.....	125
Haggard v. Wallen, 6 Neb., 271.....	193
Hall v. Hall, 77 Miss., 741; 27 So., 637.....	402
Hamilton v. State, 142 Ind., 276.....	99
Hanes v. State, 155 Ind., 112.....	297
Hanna v. McKenzie, 5 B. Mon., 314; 14 Am. Dec., 122....	67
Hantz v. Sealy, 6 Binn., 405.....	358
Harden v. State, 39 Tex. Cr. Rep., 426; 46 S. W., 803.....	296
Harper v. Albee, 10 Ia., 389.....	114
Harper v. Fairley, 53 N. Y., 442.....	149
Harris v. Davenport, 132 N. C., 697.....	470
Hart v. Ry. Co., 122 Wis., 308.....	114
Haskins v. Olcott, 13 O. St., 210.....	72
Havemeyer v. Super. Ct., 84 Cal., 327; 18 Am. St., 192.....	394
Hays v. People, 1 Hill (N. Y.), 351.....	297
Hays v. State, 77 Ind., 450.....	99
Hill v. Joy, 149 Pa. St., 243.....	421
Hoag v. Wright, 174 N. Y., 36.....	359
Hobson v. Sherwood, 4 Beav., 184.....	38
Hodson v. Warner, 60 Ind., 214.....	192
Hoke v. Applegate, 92 Ind., 570.....	192
Holley v. Torrington, 63 Conn., 426.....	419
Holmquist v. Gilbert (Colo.) 92 Pac., 232.....	150
Holz v. Hanson, 115 Wis., 236.....	433
Hopkins v. Bowers, 111 N. C., 175.....	359
Horn v. Board, 135 N. Y., 473.....	522
Howard v. Braun, 14 S. Dak., 579.....	195
Hoy v. Rogers, 4 T. B. Mon., 236.....	68
Hughes v. Boone, 19 S. E.....	149
Hunt v. Franklin Co. Comm'rs., 100 Me., 445; 62 Atl., 213....	425
Hunter v. Hunter, 100 Ill., 477.....	400
Imboden v. Trust Co., 11 Mo. App., 220.....	360
Indianapolis &c. R. Co. v. Strauss, 81 Ill., 504.....	320

CASES CITED.

xiii

In re Allison, 13 Colo., 525.....	278
In re Belt, 159 U. S., 95.....	281
In re Bigelow, 113 U. S., 328.....	281
In re Blyth, 110 Cal., 231.....	353
In re Bogart, 2 Sawy., 396.....	279
In re Est. of Mather, 210 Ill., 160.....	359
In re Lloyd, 51 Kan., 501; 33 Pac., 307.....	297
In re Mahany, 68 Pac., 235.....	279
In re McKnight, 52 Fed., 799.....	270
In re Myrtle, Cal. App. 84 Pac., 335.....	78, 103
In re Neilson, 131 U. S., 176.....	282
In re Snow, 120 U. S., 274.....	281
In re Sherrill, 81 N. E., 124.....	515, 535
In re Terrill, (Kan.) 49 Pac., 158.....	279
In re Thorpe, 64 Vt., 398.....	250
In re Tice, 49 Pac., 1038.....	283
Isaacs et al. v. Price, 2 Dill., 347.....	470
Jackson v. Jackson, 82 Md., 17.....	361
Jameson v. Hayward, 106 Cal., 682; 46 Am. St., 268.....	39
Johnson v. Anderson (Kan.), 57 Pac., 513.....	433
Johnson v. Brown, (Kan.) 86 Pac., 503.....	39
Johnston v. State, 118 Ga., 310.....	393
Keenan v. Stimson, 32 Minn., 377.....	198
Keeton v. State, 70 Ark., 163.....	100
Keller v. Hawk, (Okla.) 91 Pac. (adv. Sheet), 778.....	125
Kellogg v. Cochran, (Cal.) 25 Pac., 677.....	241, 242
Kelly v. Rosenstock, 45 Md., 389.....	189
Kennealy v. Chicago, 220 Ill., 485.....	523
Kerper v. Wood, 48 O. St., 621.....	148
Kesler v. Kesler, 39 Ind., 153.....	400
Ketterman v. R. R. Co., 48 W. Va., 606.....	201, 470
Kinney v. Columbia Ass'n, 113 Fed., 359.....	463
Kittel v. Callahan, 19 N. Y. Suppl., 397; 46 N. Y. St., 404.....	231
Knight v. State, 84 Ind., 73.....	99
Krause v. Krause, 33 Wis., 354.....	402
Lake v. Lake, 16 Nev., 363.....	401
Landers v. Bolton, 26 Cal., 393.....	184, 185
Lang v. Gage, 65 N. H., 173.....	150
Leavitt v. Morrow, 6 O. St., 71.....	432
Lee v. Newland, 164 Pa. St., 360.....	123
Leek v. Cresley, 98 Ia., 593.....	195
Leibschcr v. State, 69 Neb., 395; 95 N. W., 870.....	297
Lewis v. Smart, 67 Me., 206.....	195
Los Angeles F. & M. Co. v. Thompson, 117 Cal., 594.....	201
Lyon v. Miller, 24 Pa., 392.....	421

Maden v. Emmons, 83 Ind., 331.....	274, 283
Mason v. Crowder, 85 Mo., 526.....	125
Mason v. Mo. Pac. Ry. Co., 25 Mo. App., 473.....	315
Matter of Brush, 25 N. Y. App. Div., 610.....	359
Maxwell v. Wilmington Dental Mfg. Co., 82 Fed., 214.....	378
McCreary v. R. Co., 109 Mo. App., 567; 83 S. W., 82.....	316
McDonald v. Met. St. Ry. Co., 167 N. Y., 66.....	201
McInerney v. City of Denver, 17 Colo., 302.....	395
McKenna v. McKenna, 180 Ill., 577.....	358, 360
McRoberts v. Lockwood, 49 O. St., 374.....	41, 43
McVicker v. Conkle, 95 Ga., 584.....	184
Meisler v. Meisler, 94 Ill. App., 396.....	379
Meisse v. McCoy's Adm'r., 17 O. St., 225.....	470
Mercer v. Mercer, 19 Colo. App., 51; 73 Pac., 662.....	402
Merchants Bank v. Cook, 4 Pick., 405.....	469
Merrill v. Deering, 24 Minn., 179.....	113
Merrill v. Denton, 73 Mich., 628.....	195
Metcalf v. Miller, 96 Mich., 459.....	37, 38
Mich. So. &c. Ry. Co. v. McDonough, 21 Mich., 165.....	316
Miller v. Case, (Kan.) 51 Pac., 922.....	279
Miller et al. v. Toledo G. & M. Co., 21 O. C. C., 332.....	139
Moffit v. Carr, 48 Neb., 403.....	149, 150
Moline Plow Co. v. Webb, 141 U. S., 616.....	472
Moore v. Brown, 11 How., 414.....	125
Mo. Pac. R. Co. v. Kingsbury, (Tex.) 25 S. W., 322.....	336
Morrow v. Cole, 58 N. J. Eq., 203.....	182
Moseman v. State, 59 Neb., 629; 81 N. W., 853.....	231
Muir v. Muir, 87 S. W. (Ky.), 1070.....	400
Murphy v. State, 120 Ind., 115; 22 N. E., 106.....	296
Murphy v. U. S., 104 U. S., 464.....	426
Nat. Bank v. Conway, 17 Fed. Cas. No. 10037.....	212
Newsom v. Luster, 13 Ill., 175.....	184, 185
Nichols v. Nichols, 28 Vt., 228; 67 Am. Dec., 699.....	36
Noble v. Arnold, 23 O. St., 265.....	69, 70
Norfolk & W. R. Co. v. Sutherland, 89 Va., 703.....	336
Normile v. R. & Nav. Co. (Ore.), 69 Pac., 928.....	336
North v. Trustees &c., 137 Ill., 296.....	523
O'Brien v. R. R. Co., 102 Wis., 628.....	202
Offutt v. Col. Exposition, 175 Ill., 472.....	201
Ogden B. Ass'n v. Mensch, 196 Ill., 554.....	182
Palmer v. Cir. Judge, 83 Mich., 528.....	245
Parker v. State ex rel., 132 Ind., 419.....	522
Parker v. State ex rel., 133 Ind., 178.....	534

CASES CITED.

xv

Pauly v. Pauly, 69 Wis., 419.....	402
People v. Ammerman, 118 Cal., 23.....	77
People v. Anglo-Am. S. & L. Ass'n, 107 N. Y. (App. Div.), 94 N. Y. Suppl., 1113.....	379
People v. Bd. of Health, 140 N. Y., 1.....	446, 447
People v. Cleary, 81 Pac., 753.....	78
People v. Courier, 79 Mich., 366.....	297
People v. Diedrich, 141 Ill., 665.....	134
People v. Dowell, 135 Mich., 306; 99 N. W., 23.....	299
People v. Fleming, 94 Cal., 308.....	301
People v. Jones, 53 Cal., 58.....	77
People v. Laurintz, 114 Cal., 628; 46 Pac., 613.....	297
People v. McCann, 16 N. Y., 58.....	221
People v. McDonald, 9 Mich., 150.....	297
People v. Mead, 78 Pac., 1047.....	104
People v. Olson, 215 Ill., 620.....	519, 523
People v. Ruloff, 3 Park. Cr., 126.....	279
People v. Roach, 129 Cal., 33.....	303
People v. Taylor, 117 Mich., 583.....	270
People v. Thompson, 155 Ill., 451.....	534
People v. Vann, 129 Cal., 118.....	297, 301
People v. Verdigreen, 106 Cal., 211; 46 Am. St., 234.....	300
People v. Vice, 21 Cal., 344.....	77
People ex rel. v. Board of Canvassers, 129 N. Y., 360; 29 N. E., 345.....	514, 520
People ex rel. v. Dist. Court, 26 Colo., 386.....	394
People ex rel. v. Rice, 135 N. Y., 473.....	522, 545
People ex rel. v. Supervisors, 135 N. Y., 473.....	522
People ex rel. v. Thompson, 155 Ill., 451.....	522
Perry v. Cheboygan, 55 Mich., 250; 21 N. W., 333.....	426
Perry v. Richardson, 27 O. St., 110.....	41
Perry v. State, 41 Tex., 488.....	276
Peterson v. Lowry, 48 Tex., 408.....	182
Phillips v. Dorris, 56 Neb., 293.....	44
Phillips v. Phillips, 27 Wis., 252.....	401, 402
Pickles v. Ansonia, 76 Conn., 276.....	419
Pitner v. State, 44 Tex., 578.....	276
Pleasants v. Faut, 22 Wall., 120.....	201
Pleyte v. Pleyte, 15 Colo., 125; 25 Pac., 25.....	401
Pollock v. Pollock, 7 S. Dak., 331.....	402
Polson v. State, 135 Ind., 519; 35 N. E., 901.....	297
Powers v. Executors &c., 35 La., 630.....	360
Powers et al. v. Bumcratz, 12 O. St., 271, 293.....	70
Pratt v. Ogdenburg &c. Ry. Co., 102 Mass., 557.....	320
Prine v. Prine, 36 Fla., 676; 34 L. R. A., 87.....	401

Railroad Co. v. Hammond, 25 Kan., 208.....	112, 114
Railway Co. v. Stone, (Kan.) 37 Pac., 1012.....	433, 434
Read v. Loan Co., 68 O. St., 280.....	212
Redfields v. Parks, 132 U. S., 239.....	125
Reed v. Merriam, 15 Neb., 323.....	122
Reese v. Northway, 58 Ia., 187.....	69
Regan v. Williams, 80 Mo. App., 577.....	150
Reilly v. Reilly, 60 Cal., 624.....	400
Richardson v. Loupe, 80 Cal., 490.....	44
Richardson v. Opelt, 69 Neb., 180.....	422
Ridgely v. Bank, 75 Fed., 808.....	179
Robertson v. Smith, 129 Ind., 428; 15 L. R. A., 273.....	67, 69
Root v. New York &c. Ry. Co., 83 Hun, 111.....	320
Rosen v. U. S., 161 U. S., 30.....	88, 101
Rosenthal v. Bd. of Canvassers, 50 Kan., 159.....	520
Rosser v. Timberlake, 78 Ala., 162.....	68
Rutter v. State, 38 O. St., 496.....	249
Ryan v. Carr, 46 Mo., 483.....	124
Salmar v. Lathrop, 10 S. Dak., 216.....	125
Schleisher v. Gatlin, 85 Tex., 270.....	125
Schley v. Pullman Car Co., 120 U. S., 575.....	189
Sentney v. Overton, 4 Bibb, 445.....	184
Shaw v. Baldwin, 33 Vt., 447.....	469
Shaw v. Beers, 84 Ind., 528.....	38
Sheehy v. Hinds, 27 Minn., 259.....	123, 125
Sherman v. Transp. Co., 31 Vt., 162.....	185
Simcoke v. Frederick, 1 Ind., 54.....	469
Sloan v. Thompson, 4 Tex. Cr. App., 419.....	189
Smedley v. State, 30 Tex., 214.....	79
Smith v. Com., 95 Ky., 322.....	392
Smith v. McGregor, 10 O. St., 461.....	208
Smith v. New Haven &c. R. Co., 12 Allen (Mass.), 531; 90 Am. Dec., 166.....	320
Smith v. Sewing Mach. Co., 26 O. St., 562.....	72
Sorenson v. Sorenson, 56 Neb., 729.....	359
Sparklin v. St. James Church, 119 Ind., 535; 22 N. E., 8.....	231
Stang et al. v. Newberger et al., 6 O. N. P., 61.....	71
Stark v. Stair, 94 U. S., 477.....	422
State v. Baugham, 111 Ia., 71.....	82
State v. Blevins, 134 Ala., 213.....	282
State v. Brown, 47 O. St., 102.....	78
State v. Daucy, 83 N. C., 608.....	297
State v. Dengal, 24 Wash., 49; 63 Pac., 1104.....	79, 95
State v. Dilley, 15 Ore., 70.....	79

State v. Eaton, 75 Mo., 586.....	391
State v. Fordham, 101 N. W., 888.....	100
State v. Griffin, 79 Ia., 568.....	77
State v. Grosheim, 79 Ia., 75; 44 N. W., 541.....	297
State v. Halpin, 91 N. W., 605.....	100
State v. Hughes, 106 Ia., 125.....	359
State v. Hunter, 18 Wash., 670; 52 Pac., 249.....	296, 300
State v. Lawler, 130 Mo., 366.....	79
State v. McGimsey, 80 N. C., 377.....	283
State v. Melvin, 166 Mo., 565.....	391
State v. Messinger, 63 O. St., 398.....	105
State v. Monarty, 20 Ia., 595.....	114
State v. Morgan, 31 Wash., 226; 71 Pac., 723.....	79, 80
State v. Perry, 86 Me., 427; 41 Am. St., 564.....	86
State v. Rechnitz, 20 Mont., 488; 52 Pac., 264.....	98
State v. Sargent, 36 Ore., 110; 49 Pac., 889.....	297
State v. Seely, 69 Pac., 163.....	97
State v. Sheriff, 45 La. Ann., 316.....	279
State v. Sheriff, 24 Minn., 87.....	277
State v. Shuman, 106 Ia., 684.....	305
State v. Sistrunk, 138 Ala., 68.....	279
State v. Smith, 82 Pac., 918.....	101
State v. Smith, 12 O., 466.....	296
State v. Smith, 71 Mo., 45.....	391
State v. Swepson, 81 N. C., 571.....	393
State v. Swofford, 3 Lea (Tenn.), 162.....	79
State v. Tough, 12 N. Dak., 425.....	82
State v. Wasson, 126 Ia., 320.....	77, 80
State v. White, 80 Pac., 589.....	270, 279
State v. Wray, 109 Mo., 594; 19 S. W., 86.....	297
State v. Wrightson, 56 N. J., 126.....	522
State ex rel. v. County Comm'rs, 75 N. W., 579.....	520
State ex rel. v. Cunningham, 15 L. R. A., 568.....	523
State ex rel. v. Cunningham, 83 Wis., 90.....	523
State ex rel. v. Judge, 24 La., 598.....	114
State ex rel. v. St. Louis Ct. of App., 88 Mo., 135.....	400
State ex rel. v. Super. Ct., 5 Wash., 518.....	394
State ex rel. v. Williams, 117 Mo. App., 564.....	276
Steiner v. Nerton, 6 Wash., 23; 32 Pac., 1063.....	278
Stephens v. Hampton, 46 Mo., 404.....	182
Stephens v. State, 107 Ind., 185; 8 N. E., 94.....	296
Stevenson v. Miller, 2 Litt., 310; 13 Am. Dec., 271.....	68
Stratham v. Blackford, 89 Va., 771.....	249
Strickland v. State, 19 Tex. App., 518.....	81

Tabler v. Wiseman, 2 O. St., 207.....	37
Territory v. Keyes, 5 Dak., 244; 38 N. W., 440.....	297
Thomas v. Brewer, 55 Ia., 227.....	150
Tilson v. Thompson, 10 Pick., 359.....	123
Titus v. Johnson, 50 Tex., 224.....	182
Toledo Loan Co. v. Larkin, 25 O. Cir. Ct., 209.....	39
Troy v. State, 10 Tex. App., 319.....	447
Trustees &c. v. Payne, 3 T. B. Mon., 161.....	125
Turnpike v. Dulaney, 86 Ky., 518; 6 S. W., 590.....	69
Tyler v. Hamilton, 108 Ky., 120; 55 S. W., 920.....	69
Tyrell L. & B. Ass'n v. Haley, 139 Pa. St., 476.....	474
Uphaus v. Miller, 68 O. St., 401.....	208
U. P. R. R. Co. v. Rainey, 19 Colo., 225.....	315
U. S. v. Green, 146 Fed., 778.....	87
U. S. v. Hannon, 45 Fed., 414.....	81
U. S. v. McNemara, 26 Fed. Cas. No. 15701.....	81
U. S. v. Smith, 27 Fed. Cas. No. 16318.....	98
Valentine v. Piper, 22 Pick., 85.....	184
Van Duzer v. Van Duzer, 70 Ia., 614.....	402
Van Voorhis v. Van Voorhis, 90 Mich., 276.....	402
Varney v. Varney, 54 Wis., 422.....	402
Wallis v. Dilley, 7 Md., 237.....	70
Wagner v. Wagner, 36 Minn., 239.....	402
Wapello Co. v. Sinnamon, 1 G. Greene, 413.....	421
Ward v. Masterson, 10 Kan., 77.....	209
Warder v. Henry, 117 Mo., 530.....	189
Waterson v. Devoe, 18 Kan., 223.....	125
Watts v. Creighton, 85 Ia., 154.....	472
Weaver v. Toney, 54 S. W., 732.....	395
Weidman v. Dilger, 46 N. Y. Super. Ct., 101.....	113
Weidner v. Rankin et al., 26 O. St., 522.....	71
Westinghouse Co. v. Boyle, 126 Mich., 677.....	150
Whitcher v. State, 2 Wash., 286.....	296
White v. White, 82 Cal., 427.....	360, 361
Whitner v. Chambers, 17 Neb., 90.....	148
Whitten v. Tomlinson, 160 U. S., 231.....	281
Wilkinson v. Stuart, 74 Ala., 198.....	37
Williams v. Bankhead, 19 Wall., 563.....	43
Williams v. Herrick, 21 R. I., 401.....	360
Williams v. McLanahan, 67 Mo., 499.....	124
Willits v. Willits, (Neb.) 107 N. W., 767.....	402
Witter v. Lyon et al., 34 Wis., 564.....	136

CASES CITED.

xix

Wofford v. McKenna, 23 Tex., 36.....	125
Wolford v. Cook, 71 Minn., 77.....	150
Woodman v. Segar, 25 Me., 90.....	185
Woodworth v. State, 145 Ind., 276.....	106
Wright v. State, 5 Ind., 290.....	273
Yocum v. Barnes, 8 B. Mon., 496.....	185
Zeigenfuss v. Zeigenfuss, 21 Mich., 414.....	402
Zirken v. Hughes, 77 Cal., 235.....	420

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF WYOMING

APRIL TERM, 1907.

FIELD ET AL. v. LEITER ET AL.

APPEAL AND ERROR—DEATH OF PARTY—SUBSTITUTION—PARTITION—
PARTIES—LIFE TENANT—REMAINDERMEN—NATURE OF ACTION—
ISSUES—RES JUDICATA—POSSESSION BY EXECUTOR, EFFECT OF ON
PARTITION—PARTITION COMMISSIONERS—PROCEEDINGS—REPORT—
PREPARATION BY COUNSEL—EXCEPTIONS TO REPORT—CONFLICTING
EVIDENCE—EXCLUSION OF LEASEHOLD PREMISES.

1. The death of a plaintiff in error subsequent to the filing of the petition in error and issuance of summons in error does not abate the proceeding.
2. Upon the suggestion of the death of a plaintiff in error since the institution of the proceeding in error, who was such a party in his capacity as trustee, the substitution of his successor in trust is proper with the same rights, liabilities and purposes as his predecessor.
3. Unless otherwise provided by statute, a partition of estates held in remainder only without a present right of possession is not enforceable, nor can partition be compelled between a tenant in possession and mere remaindermen.
4. In the absence of a statute authorizing it, partition cannot be awarded either in equity or at law of an estate in reversion or remainder.
5. Partition may be had between the life tenant of an undivided part and the owner in fee of the other part, at the suit of either.

6. The common law in respect to the persons who may require or be compelled to suffer partition is not enlarged upon by the statute authorizing the remedy between tenants in common and co-parceners.
7. A legal title whether in fee or for life to an undivided part, accompanied by possession or right of possession, entitles the owner to maintain partition against the owner of the remaining part holding the same as tenant in common with him.
8. An action to compel partition is a civil action under the code.
9. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief.
10. Partition under the code is not necessarily to be regarded or designated as exclusively either a legal or equitable proceeding. A particular action may be one or the other or a combination of both, depending upon the nature of the titles asserted and the relief sought.
11. The question of parties in partition is to be settled according to the issues in the case and the relief demanded.
12. The code provision that any person may be made a defendant who has or claims an interest adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of a question involved, does not constitute every one referred to a necessary party to the rendition of a valid judgment; nor does it abolish the distinction between necessary and proper parties. (R. S. 1899, Sec. 3480.)
13. Those having or claiming an interest adverse to the plaintiff are necessary parties, while those merely necessary to a complete determination of a question involved are, as a rule, proper but not necessary parties.
14. The rights of the parties in an action for partition are determined by the order which finds them to be tenants in common, ascertains and adjudges the respective shares and orders a partition thereof, whether such order be deemed interlocutory or final.
15. A defect of parties in partition not affecting the jurisdiction of the court is waived unless the objection is raised by demurrer or answer as required by the general code provisions.
16. In an action for partition between the parties to the suit, those parties only, and others, if any, virtually represented by them, will be bound by the proceedings and judgment.
17. An executor's possession of real estate is only during and for the purpose of administration and not adverse to the heirs

or devisees, and does not prevent the latter from maintaining a suit in partition against other tenants in common; it not appearing that the administration will be prejudiced thereby, and the statute declaring that for the purpose of bringing suit for partition the possession of an executor or administrator is the possession of the heirs or devisees.

18. The owner in fee of an undivided part and the tenant for life of the other part being tenants in common, the former may maintain partition against the latter, at least where the property is capable of partition, without joining the remainderman who is not in possession nor entitled thereto, whether the estate in remainder be vested or contingent, and though the proceeding may not bind the remainder interest.
19. The owner in fee of an undivided part conveyed his interest to another in trust to pay the net income to the grantor during his life, and with power to manage and dispose of the property and to invest and re-invest proceeds; and provided in the deed that upon the grantor's death the trust should cease and that the estate then in the trustee's hands should vest in the grantor's children. The owner in fee of the other undivided part brought an action of partition against said trustee and his grantor, wherein the pleadings admitted the parties to be tenants in common, and the answer consented to partition. After the ordering of partition, and the report of commissioners partitioning the property, the proceedings were objected to as void because the children of the grantor in the trust deed, one of whom intervened and objected, had not been made parties. The objection was overruled and the report confirmed, the court declining to determine the interest of said children under the trust deed and partition. *Held*, on error, that the trustee had at least the title of the life tenant; that the partition was not void for the want of necessary parties, but was valid and binding between the parties to the suit; and that it was not necessary to decide what the rights of the children in the property were, nor the effect of the joint consent of the trustee and life tenant to the partition order, nor the extent, if any, to which they represented and bound other parties.
20. Whether the rule in such case would be different had the property been found incapable of partition, and its sale therefore necessary or an election to take at the appraised value, is not considered.

21. The rejection of the report of partition commissioners is not justified on the sole ground of an omission to state the character and situation of the premises, or that they had been equitably and advantageously partitioned; the statute not expressly requiring the report to so state.
22. The action of commissioners in partition will not be set aside on the ground of unequal allotments, except in extreme cases—as where the partition appears to have been made upon wrong principles, or where it is shown by clear and decided preponderance of the evidence that the partition is grossly unequal.
23. Exceptions to the report of commissioners in partition on the ground of inequality in the allotments not being sustained by a clear preponderance of conflicting evidence, the fact that the dissatisfied party, pending the hearing of the exceptions, has offered to accept a different division, or to pay the other party for his share a sum exceeding the value set by the commissioners upon the part allotted to him, is not sufficient to vacate the partition; since, if the lands are capable of partition, a party is not compelled to sell his interest, whatever the price offered.
24. It is imperative that the proceedings of commissioners in partition should be fairly conducted, with an equal opportunity to all parties to be heard; and a vacation of their report would be proper upon its appearing that secret or undue influence upon their action had been exercised by either party.
25. The mere fact that the general manager for the contesting parties of the extensive property in controversy had accompanied the partition commissioners when they examined the various tracts, *held* not sufficient to cause a vacation of their report and partition, it not appearing that the manager had been present at any of the several deliberations of the commissioners, no specific act or statement of his being shown as having influenced the allotment, no intentional impropriety or prejudice appearing and the object of the commissioners and the manager as stated by them having been that the latter, as representing all the parties, might point out the property and assist merely in its examination.
26. Where the parties to a suit for partition have consented by their pleadings to a partition of the premises described in the petition, without any suggestion that other tracts are also held in similar co-tenancy, an objection on the ground of the exclusion of such other tracts ordinarily comes too

late after judgment and the report of the commissioners, especially so where there is no inherent objection to a separation of the different tracts.

27. As against an objection first made after the filing of the report of the commissioners, the exclusion of scattering tracts of state lands held under lease and used to command a range for cattle in connection with a large body of ranch and hay lands owned by the parties, *held* not fatal to the partition of the latter, there being no inherent difficulty in making such partition separate from the leasehold premises.
28. Defendant was not prejudiced by the fact that plaintiff's counsel prepared the report of the commissioners, where it was so prepared after the announcement by the commissioners of their conclusions in the presence of counsel for both parties, and their request thereupon that counsel prepare the report, and the report conformed in all respects with the conclusions previously announced, and, though furnished with a copy, defendant's counsel declined to make any suggestions respecting its contents.

ON PETITION FOR REHEARING.

1. It is not necessary in pronouncing judgment upon the issues between the parties to a suit to include therein a determination of its effect upon other designated persons.

[Decided June 10, 1907.] (90 Pac., 378.)

[Rehearing denied December 7, 1907.] (92 Pac., 622.)

ERROR to the District Court, Laramie County, HON. RICHARD H. SCOTT, Judge.

Action for partition. The material facts are stated in the opinion.

Burke & Clark, Samuel T. Corn and Henry W. Magee, for plaintiffs in error.

The examination by the commissioners of the lands partitioned, made by merely driving over the lands when they were covered with snow, was entirely inadequate. (R. S. 1899, Sec. 4086.) The failure of the plaintiffs below to accept one of the offers of defendants is conclusive evidence that they are unwilling to stand upon their opinion as to values, and that an inequitable partition has been made.

When gross inequality of a partition is proven, as in this case, the court should set it aside upon the refusal of an equitable offer made by the dissatisfied party. Such offers are proper and pertinent upon the question of the justness of the action of the commissioners. (Moore v. Williamson, 73 Am. Dec., 93; Kiebel v. Leick (Ill.), 73 N. E., 187; Cockrell v. Coleman's Adm., 55 Ala., 583; Richards v. Ruddy, 83 Pac., 606; R. S. 1899, Sec. 4794.) Inequality in the partition is good ground for vacating the report of commissioners. (2 Dan. Ch. Pr., 1130; Riggs v. Dickinson, 2 Scam., 438; Gouch v. Green, 102 Ill., 507; Holland v. Stout, 22 Ind., 488; Miller v. Rouse, 2 O. Dec., 358; R. Co. v. Houghton (Mich.), 18 N. W., 788; Klingsmith's Est., 130 Pa. St., 521.)

This is a civil action under the code, and involving as it does the equitable rights of the parties in interest, it is in effect a suit in equity, governed by the equitable rules applicable to the facts of the case, and it is not a purely statutory proceeding, or a special proceeding under the statute. (Corwine v. Mace, 36 O. St., 125; Lindsay v. Zanoni, 6 O. C. C., 477; Chin v. Trustees, 32 O. St., 236; McRoberts v. Lockwood, 49 O. St., 374; English et al. v. Monypenny, 6 O. C. C., 562; Stone v. Doster, 7 O. C. C., 10; Morgan v. Stayley, 11 O., 389; Perry v. Richardson, 27 O. St., 119; Swihart v. Swihart, 7 O. C. C., 342; Hogg v. Beerman, 41 O. St., 94; Cory v. Lamb, 43 O. St., 390.)

Where the proceeding is purely statutory it is held that only parties in possession or entitled thereto could demand partition, in accordance with the English authorities. (Tabler v. Wiseman, 2 O. St., 208; Younges v. Heffner, 36 O. St., 237; 1 Wash. Real Prop., 447-448; Mussey v. Sanborn, 15 Mass., 155; Freeman on Partition, pp. 579 to 584; Wilkinson v. Stuart, 74 Ala., 205; West v. West, 90 Ala., 461; Merritt v. Hughes (W. Va.), 15 S. E., 56.) But since it has become a civil action the entire title may be partitioned, provided all parties in interest are made parties. (Lindsay v. Zanoni, *supra*; Hogg v. Beerman,

supra.) The refusal of the court to adjudicate the rights of all parties necessarily involved, and to admit the *cestuis que* trust as parties, was, therefore, in direct violation not only of the general rule, but of the theory of our statutes.

The executors of the Leiter will being in possession, the plaintiffs, as trustees and devisees, were neither tenants in common not entitled to possession. They were, therefore, not proper parties plaintiff. (R. S. 1899, Secs. 4081, 4084; Morrison v. Bank (Ill.), 72 N. E., 1112; Smith v. Pratt, 13 O., 551; Serena v. Moore (N. J.), 60 Atl., 953; 21 Ency. L., 1151; Honeywell v. Taylor, 6 Cush., 472; Conter v. Herschel, 24 Nev., 152; Tabler v. Wiseman, 2 O. St., 209; Sevens v. Enders, 13 N. J. L., 271.) The provisions of the probate code refer only to partition among heirs and do not apply to this action. It is no answer to this contention that Field, trustee, and Pratt consented by their answers that partition might be made, for the only decree possible under our statute is one putting the petitioner in possession in severalty of lands of which they were in possession, or entitled to possession, in common. A decree divesting the executors of the possession and conferring it upon the trustees is in violation of law, and consent cannot confer jurisdiction upon the court to do a thing contrary to law.

The daughters of Pratt were parties in interest, and as such necessary parties. (R. S. 1899, Secs. 3480, 3487, 4083; Fisher v. Hopkins, 4 Wyo., 390; Thames v. Mangun (Miss.), 40 So., 377; 1 Story's Eq., 656; 3 Pom. Eq. Jur., 1387; Pom. R. & R., 373; 15 Ency. Pl. & Pr., 792; 2 Perry on Trusts, 873, 881; Wash. R. Prop., 449 (2d Ed.); Freeman on Part., 579, 580, 583, 593; O'Connor v. Irvine, 74 Cal., 435; Halloway v. McIlhenny Co., 77 Tex., 657; Hurley v. O'Neil (Mont.), 79 Pac., 242; Rivans v. Summers, 33 Fla., 540; Phosphate Co. v. Anderson (Fla.), 37 So., 730; Klingensmith's Est., 130 Pa. St., 521; Bell v. Adams, 81 N. C., 118; Gayle v. Johnston, 80 Ala., 398; Fitts v. Craddock (Ala.), 39 So., 506; Whitlow v. Eckels,

78 Ala., 206; McCorkle v. Ray, 76 Ala., 213; Cotton v. Cash (Miss.), 37 So., 459; Moore v. Appleby, 36 Hun, 370; Nichols v. Mitchell, 70 Ill., 258; Campbell v. Campbell, 63 Ill., 642; Hickenbotham v. Blackledge, 54 Ill., 316; Barney v. Baltimore, 6 Wall., 285; Tabler v. Wiseman, 2 O. St., 208; Younges v. Heffner, 36 O. St., 237; Barr v. Chapman, 7 O. C. C., 396; Webster v. Dennis, 4 O. C. C., 315; McBain v. McBain, 15 O., 337; Morrow v. Morrow (Pa.), 25 Atl., 1107.) As holders of a vested future estate or remainder they were entitled to be made parties. (Campbell v. Stokes (N. Y.), 36 N. E., 811; Miller v. Wright (N. Y.), 16 N. E., 205; Badgett v. Keeting, 31 Ark., 400.)

Vesting title and vesting possession are two distinct matters. A remainder is vested (of title) if the event upon which its passage depends were to happen there would be a vesting of possession in the remainderman. But if the vesting of the remainder is uncertain for want or uncertainty of a remainderman, the remainder is said to be contingent. That is, it is the uncertainty of the right were the event ending the life estate to occur and not an uncertainty because of a possible revocation of the will or deed, that makes the remainder contingent, nor is it the uncertainty as to who all may be the remaindermen or recipients of possession upon the termination of the life estate, it being sufficient to make a vested remainder that at the time the instrument is called in question there exists (*in esse*) a remainderman, for then, under such condition, the remainder is said to be vested. (Scott v. Stebbins, 91 N. Y., 605; Salisbury v. Slade (N. Y.), 54 N. E., 743; *In re Brown*, 154 N. Y., 313; Savage v. Williams, 15 La. An., 254; Numsen, Trustee, v. Lyon, 87 Md., 31; Estes v. Nell, 108 Mo., 172; Hiles v. Rule, 121 Mo., 248; Croxall v. Shererd, 5 Wall., 268; Doe v. Considine, 6 Wall., 475; Burley v. Clouge, 52 N. H., 267; Collins v. Collins, 40 O. St., 361; Railsback v. Lovejoy, 6 N. E., 504; Blanchard v. Blanchard, 1 Allen, 223; Ducker v. Burnham, 146 Ill., 20; McArthur v. Scott, 113

U. S., 340; *Thaw v. Falls*, 136 U. S., 546.) The children of Pratt were "persons interested." (*Campbell v. Purdy*, 5 Redf., 434; *Ormsby v. Ottman*, 85 Fed., 493; *Sweatman v. Dean* (Miss.), 38 So., 231.)

The objection was timely made as to the defect of parties defendant. (15 Ency. Pl. & Pr., 688-9; *Halloway v. McIlhenny* (Tex.), 14 S. W., 240; *Hurley v. O'Neil* (Mont.), 79 Pac., 242; *Toole v. Toole et al.* (N. Y.), 19 N. E., 682; *O'Connor v. Irvine*, 74 Cal., 235.)

The entire lands of the partnership, including those held by lease, should have been included in and partitioned in this proceeding. (17 Ency. L., 752; 21 id. (2d Ed.), 1162; *Hurley v. O'Neil*, 79 Pac., 244; *Sutter v. San Francisco*, 36 Cal., 116; *Miller v. Miller*, 13 Pick., 239; *Grubb v. Grubb*, 74 Pa. St., 25; 1 Wash. R. Prop., 582; *Freeman on Part.*, 508; *Wilkinson v. Stuart*, 74 Ala., 205; *West v. West*, 90 Ala., 458; *Hanson v. Willard*, 12 Me., 145; *Duncan v. Sylvester*, 16 Me., 388; *Bigton v. Littlefield*, 52 Me., 26.) The fact that Mr. Irvine accompanied the commission at the time they viewed the land, and that the report of the commission was prepared by counsel for defendants in error, no one representing the exceptors being present, invalidates the proceeding. (*Gage v. Gage* (N. H.), 14 Atl., 869; *McLaughlin v. Judge* (Mich.), 23 N. W., 472; *Paul v. Detroit*, 32 Mich., 117; *Goch v. Green*, 102 Ill., 507; *Simpson v. Simpson* (Mich.), 26 N. W., 287; *Walmsley v. Mill Creek* (W. Va.), 49 S. E., 141.)

A report of a commission in partition should be sufficiently in detail and so set forth the facts upon which the commission have acted, as to show to the court that the law, both in letter and spirit, has been complied with, that the court may know that the partition is equal, equitable and just as between the parties in quantity and value, for it is only such a partition that the court ought to or can legally confirm, and this knowledge should come to the court officially, as the official knowledge and action of its commission, and not by and through partisan affidavits in subse-

quent proceedings, prepared by skillful and prejudiced counsel. (R. S. 1899, Secs. 4086, 4087; 15 Ency. Pl. & Pr., 817; Skinner v. Carter (N. C.), 12 S. E., 908; Brown v. Sceggell, 22 N. H., 551; Hathaway v. Unknown Persons, 32 Me., 136; Tucker v. Tucker, 19 Wend., 226; Brokaw v. MacDougall, 20 Fla., 233; Cecil v. Dorsey, 1 Md. Ch., 227; 2 Dan'l. Ch. Pl. & Pr., 1133; Stallings v. Stallings, 22 Md., 41; McGee v. Russell, 49 Ark., 109; Hardin v. Cogswell, 5 Heisk., 549; Shearer v. Shearer, 125 Ia., 394; Story's Eq., Sec. 655.) The report in this case fails to set forth the necessary facts and should be set aside on that ground.

The refusal of the court to make any findings as to the interest of the daughters of Pratt, who held the remainder estate, was erroneous. It is the well known office of a court of equity to remove clouds from titles, but the lower court, instead of performing that function, has cast a cloud over the entire title to the property. It was not only necessary to determine these matters in order to make proper order of partition, but it should have been made known to and carefully considered by the commission, that they might adopt a proper theory of partition and make a just and equitable division, for a very different theory of appraisement might be necessary in making partition of a simple life estate, which in this case could not hope to exceed fifteen years, from what would be applied in a partition of the fee.

Henry W. Magee, Burke & Clark and Samuel T. Corn, for Hattie B. Pratt Magee, the intervening petitioner, filed a separate brief.

By reason of the interest granted to them by the trust deed in all of the property owned by said Pratt and said Leiter, deceased, in partnership, Hattie B. Pratt Magee and Margaret Pratt Olsson were necessary and indispensable parties to the proceedings or action for partition instituted by the defendants in error, under both the rules of common law, and the statute law and constitution of Wyoming and the constitution of the United States. (R. S. 1899, Secs.

4083, 3480, 3487; *Fisher v. Hopkins*, 4 Wyo., 379; *Bailey v. Holmes*, 3 L. R. Ch. Div., 690; *Allen v. Tritch*, 5 Colo., 222; *Robinson v. Fair*, 128 U. S., 53; *Doe v. Willard*, 18 How., 297; *Miller's Eq. Pro.*, 42; *Smith v. Gains*, 39 N. J. Eq., 545; *Thompson v. Holden*, 117 Mo., 125; *Halloway v. Halloway*, 97 Mo., 633; *Hiles v. Rule*, 121 Mo., 256; *Lily v. Menke*, 126 Mo., 190.) The statute does not allow temporary partition for and during a life estate. The phrase of the statute, "may be made a defendant," cannot be treated as directory or as giving discretion, when to do so persons will in consequence be divested of property and constitutional rights. (20 Ency. L. (2d Ed.), 239; *State v. Sweetser*, 53 Mo., 440; *Fowler v. Perkins*, 77 Ill., 271; *Hogan v. Devlin*, 2 Daly, 184; *Webb v. Robbins*, 77 Ala., 180; *Terr. v. Nelson*, 2 Wyo., 346; *Black's L. Dict.*, 762; *Mason v. Fearson*, 9 How., 422; *Clendenning v. Guise*, 8 Wyo., 91; *Schenck v. Ry. Co.*, 5 Wyo., 430; *Inv. Co. v. Carpenter*, 9 Wyo., 110; *State ex rel. v. Board*, 7 Wyo., 478.)

By the terms of the trust deed the intervening petitioner and her sister each became seized of an estate of a vested remainder. A remainder to definite, ascertained persons in being dependent only upon a life estate which is to terminate at the death of the life tenant is unequivocally a vested remainder. It has no element of contingency whatever, neither as to (1) the happening of the determining event, or (2) the persons who are to take at the determination of the life interest, and having these requisites of certainty the interest created is unfailingly a vested remainder in the two daughters, and a further contingent remainder in their children living at their death. (*Coleman's Fearné on Rem.*, 6; *Bunting v. Speck*, 41 Kan., 424; *Doe v. Considine*, 6 Wall., 474; *Kemp v. Bradford*, 61 Md., 330; *McArthur v. Scott*, 113 U. S., 430; *Weston v. Weston*, 125 Mass., 268; *Moore v. Lyons*, 25 Wend., 119; *Com. v. Hackett*, 102 Pa. St., 505; *Gourley v. Woodbury*, 42 Vt.; 2 *Hammond's Bl.*, 293; *Chapin v. Nott*, 203 Ill.,

341; *Smith v. West*, 103 Ill., 332; 4 Kent's Com., 202; 8 Words and Phrases, 7305; *Johnson v. Edmond*, 65 Conn., 492; *Smith v. McWhorter* (Ga.), 51 S. E., 471.) Having such vested remainder, they cannot be represented by the trustee or any other person. The trust was executory during the grantor's life, with no power as to the estates of the remaindermen. (*Numsen v. Lyon*, 87 Md., 31; *Fleming v. Hughes*, 99 Ga., 444; *Moore v. Appleby*, 36 Hun, 368 (108 N. Y., 237); *Campbell v. Stokes*, 142 N. Y., 23; *Mead v. Mitchell*, 17 N. Y., 210; *Freeman Part.*, 483; *Calvert's Parties in Eq.*, 55, 58, 59; 101 Am. St., 864-877; *Freeman on Judg.*, 162, 870, 874; *Bell v. Adams*, 81 N. C., 118; *Williamson v. Jones*, 43 W. Va., 562; *Bliss Code Pl.*, 109b; *Pool v. Morris*, 29 Ga., 378; 23 Ency. L. (2d Ed.), 102; *Ingersoll v. Jewett*, 16 Blatch., 378; *Carroll v. Goldschmidt*, 83 Fed., 508.) The grantor can, by his presence in this action, no more represent the remaindermen therein, than if he had granted the life estate to a third person instead of having reserved it to himself.

Gibson Clark and *John W. Lacey*, for defendants in error.

A commissioner in partition may rely not only on his own examination of the property, but also upon information derived from the other commissioners. (*Yates v. Gridley*, 16 S. C., 496; *Robb v. Robb*, 62 S. W., 125; *Knapp*, 63 Ill., 492.)

It must be assumed that the commissioners visited the lands for the purpose of looking them over in good faith to such extent as in their judgment would enable them to properly discharge their duty in the matter entrusted to them. They each say under oath that their examination was such as with their former personal knowledge enabled them to do this, and they did form an opinion from such examination and former personal knowledge as to the value of the several tracts and ranches which is supported by the great weight of the testimony. Although it was known to the plaintiffs in error and their counsel fully ten days or

two weeks before the commissioners made their award, that Mr. Irvine accompanied the commissioners while visiting the lands, not the slightest intimation of any objection to their proceeding or conduct in permitting this was made or suggested until after the award was made and published. The complaint comes too late. (*Wynn v. Ry. Co.*, 91 Ga., 344; *Watson v. Roode*, 43 Neb., 348; *Peterson v. Skjelver*, 43 Neb., 348; *Berry v. DeWitt*, 27 Fed., 723; *Bradshaw v. Degenhart*, 39 Pac., 90; *Lee v. McLeod*, 15 Nev., 158; *Patten v. M. Co.*, 11 R. I., 188; 3 Cyc., 749 (Note, 58); *Fox v. Hegelton*, 10 Pick., 275.)

The report was not improperly prepared by counsel. It correctly sets out the award as announced by the commissioners, and was prepared at the latter's request. It is a matter of every-day practice for courts to orally announce their decisions and to direct counsel to prepare in proper form the formal decree, and it is prepared generally by counsel on one side and submitted to counsel upon the other side for his suggestions and to ascertain whether or not he objects.

The necessary contents of the report of commissioners is to be determined by the nature of the action, since the statute does not detail what facts shall be set out. The court's only power as to the report is to confirm or reject it. The partition is not made by the court. (15 Ency. Pl. & Pr., p. 818; *Freeman on Co-ten. and Par.* (2d Ed.), 526; *Lucas v. Petres*, 45 Ind., 313-318; *Murphy v. Murphy*, 1 Mo., 741; *George v. Murphy*, 1 Mo., 777.) It is not necessary, nor is there any reason therefor, to state in the report that the award is equitable, etc. The presumption until the contrary appears is that the commissioners acted according to the statute. (*Stannard v. Sperry*, 16 Atl., 261.) If it is deemed to be unfair the complaining party is permitted to be heard on that question. The report conforms to the usual practice in such cases. (2 Nash. Pl. & Pr., 1354; 2 Yapple Code Pr., 839, 840; 2 Abb. Prob. L., 1208; *Bentley v. Long Dock Co.*, 14 N. J. Eq., 480; *McClanahan v. Hock-*

man, 31 S. E., 516; 2 Dan'l. Ch. Pl. & Pr., 1159; 13 Ency. Forms.)

It is not essential to partition that the entire estate held in common must be included. However, after having knowingly consented to a partition of part, it is too late after report of commissioners to object on the ground of the exclusion of the other part. The commissioners could only act as to the lands described. (*Corwith v. Griffing*, 21 Barb., 9; *Sandiford v. Hempstead*, 90 N. Y. Supp., 76.) Upon the death of Leiter, the partner of Pratt and afterwards of Field, trustee, the leasehold interests held by them as partners fell to the executors of Leiter, the surviving partner not giving bond to dispose of the business, as permitted by statute; and hence the plaintiffs below were not tenants in common with the trustee as to the leased lands, and their inclusion in the suit would have been improper. (22 Ency. L. (2d Ed.), 220; *Murdock v. Ratcliff*, 7 O., 119; *Becker v. Walworh*, 45 O. St., 169; 18 Cyc., 186; 7 Ency. L., 260; 11 Ency. L. (2d Ed.), 838.) The leased lands do not come under the head of appurtenances to the lands owned and partitioned. (*Root v. Wadhams*, 107 N. Y., 384; *Lintchicum v. Ray*, 9 Wall., 241; *Humphreys v. McKissoch*, 140 U. S., 304; 2 Ency. L. (2d Ed.), 520; *Hanson v. Willard*, 12 Mè., 142.)

The evidence being conflicting, and it not clearly appearing that the award is unjust or unequal, the report of the commissioners will not be set aside on that ground. Vacation because of inequality will not be granted except in extreme cases, as where the partition is based on wrong principles, or, as shown by a clear preponderance of the evidence, is grossly unequal. (*Freeman on Part.*, 525; *Thompson's Est.*, 3 N. J. Eq., 637; *Stannard v. Sperry*, 16 Atl., 261; *Claude v. Handy*, 83 Md., 225; 15 Ency. Pl. & Pr., 818; 5 Ency. Ev., 248; 17 Ency. L., 777; *McMullin v. Doughty*, 62 N. J. Eq., 252; *Lang v. Constance*, 46 S. W., 693; *Kane v. Parker*, 4 Wis., 123; *Greer v. Ex. of Winds*, 4 Des. Eq., 85; *Wilhelm v. Wilhelm*, 4 Md. Ch.,

330; Bentley v. Long Dock Co., 14 N. J. Eq., 480; Hancock v. Craddock, 2 B. Mon., 389; Crouch v. Smith, 1 Md. Ch., 401; Jewitt v. Scott, 19 Tex., 567; Ransom v. High, 17 S. E., 413; Cross v. Cross, 49 S. E., 129; John & Cherry Streets, 19 Wend., 659; Morrill v. Morrill, 5 N. H., 329; Livingston v. Clarkson, 4 Edw. Ch., 597.)

The intervening petitioner can assign as error only the refusal of the court to admit her as a party. She is not a party, and therefore cannot complain of any ruling on the trial. The defendants below having joined with her in the petition in error, and she with them, no questions are presented. (Milling Co. v. Price, 4 Wyo., 293; Hogan v. Peterson, 8 Wyo., 549; Gordon v. Little (Neb.), 59 N. W., 783; Ry. Co. v. Hubbard (Ala.), 38 So., 750; Wells v. Parker (Ark.), 88 S. W., 602; Custis v. Osborne (Neb.), 89 N. W., 420; Poska v. Stearns (Neb.), 84 N. W., 80; Moseman v. State (Neb.), 81 N. W., 853; McIntyre v. R. Co. (Neb.), 77 N. W., 57; Anderson v. Hall (Neb.), 94 N. W., 981; Storm v. Holmes (Neb.), 96 N. W., 73; Johnson v. Winslow (Ind.), 53 N. E., 388; King v. Easton (Ind.), 35 N. E., 181; Earhart v. Creamery (Ind.), 47 N. E., 226; Board v. Fraser (Ind.), 49 N. E., 42; Leary v. Richcreek (Ind.), 59 N. E., 35; Sibert v. Copeland (Ind.), 44 N. E., 305; Estep v. Burke, 19 Ind., 87; Rudolph v. Brewer (Ala.), 11 So., 314; Hillens v. Brinsfield (Ala.), 21 So., 208; Markham v. Washburn, 18 N. Y. Supp., 355; Miller v. Adamson (Minn.), 47 N. W., 452; Brachtendorf v. Kehn, 72 Ill. App., 228.)

The action in partition is undoubtedly a civil action, but it may not be material to determine whether it is equitable or legal in character. But on the pleadings alleging a legal title, this is clearly an action on the law side of the court. There is nothing in any of the offers of Mr. Pratt or the failure to accept them that has any weight upon the matters in issue.

The possession of the executors of the Leiter estate is only for the purposes of administration, and their posses-

sion is that of the trustees and devisees for the purpose of bringing suit for partition. (R. S. 1899, Sec. 4693.) This section of the probate code plainly applies. There was no defect of parties plaintiff therefore. Nor was there a defect of parties defendant. If Mr. Field and Mr. Pratt own a life estate and no more, the plaintiffs are entitled to partition of the property until the end of the life estate. Whether they might be entitled to other things is not material. They are entitled to this. In that case the life tenants would have no interest in the remainder nor in the possession after the life estate had ceased, and the remainder had become an estate in possession. Neither would the remaindermen have any interest in the possession during the life tenancy. The statute seems to permit partition in favor of or against estates in possession only. (Sec. 4081.) The controversy here then, if only between the owner in fee and life tenant, is such that the remaindermen would be unnecessary parties; and Section 3480 as to parties generally would not apply. Section 4083, in speaking of "other interested persons as defendants," has reference here to the persons interested in the possession during the life tenancy. The objection as to parties, however, was not timely made. (Secs. 3535, 3537, R. S. 1899.)

The children of Pratt do not take a vested remainder under the trust deed. In determining in any case whether a remainder be vested or contingent, the purpose is to ascertain the intention of the instrument, whether a will or deed. The contingencies provided for in the deed in controversy, and the powers conferred upon the trustee, make it evident that no estate has vested in the remaindermen. The lands might never go to the children—they might be sold by the trustee—either or both the daughters might die before the grantor who reserved a life interest. (4 Kent's Com., 203; Tounshend v. Frommer (N. Y.), 26 N. E., 805; Cornwell v. Orton (Mo.), 27 S. W., 536.)

The trustee is empowered to sell and convey in fee, and hence he must be held to have an estate in fee. (Robinson

v. Pierce (Ala.), 24 So., 984; Blount v. Walker (S. C.), 9 S. E., 804; Lawrence v. Lawrence (Ill.), 54 N. E., 918; Devries v. Hiss (Md.), 20 Atl., 131; Neilson v. Lagow, 53 U. S., 98; Reeves v. Brayton (S. C.), 15 S. E., 658.) Mrs. Magee and her sister do not have any legal estate in any of the lands in controversy. The entire legal fee was vested in the trustee. There cannot be, therefore, remaining any legal fee in Mrs. Magee because the whole fee takes up all the parts, and the entire fee in Field renders any legal estate elsewhere impossible. This of itself renders it unnecessary that Mrs. Magee should be made a party. The trustee owning the entire fee represented every one interested in the property held by him in trust. The intention of the grantor must be ascertained. (Thorn v. Thorn (Md.), 81 Atl., 193.) The following indications are found in the deed pointing out the intention. (1) The fee is conveyed to the trustee with absolute power of sale, of reinvestment, of conversion and of partition. (2) The grantor not only reserved for himself a life estate, but the right with the acquiescence of the trustee to use the estate to the extent of using up the principal. This is of itself held in many cases sufficient indication of the intention that the remainder shall be contingent. (3) The grantor contemplates not only an entire change of the character of the property so that it may all become invested in even capital stocks of corporations or in any other personalty, but also that the property may be consumed. This has been held sufficient to indicate an intention that the remainder should not vest until the death of the life tenant. (4) The grantor makes use of the word "vest" in relation to the remainder itself, providing that the remainder shall "go to and vest in" the remaindermen at a particular time, not the date of the execution of the instrument, but the death of the life tenant. Such of the estate as is left "then," that is to say, at the death of the life tenant, is to vest. So far as we have been able to note, there is not a single case in the books which has so many elements indicating that the remainder should not vest until

the death of the life tenant. (Cushman v. Coleman, 92 Ga., 772; Spear v. Fogg (Me.), 32 Atl., 791; Benson v. Edwards (Tenn.), 61 S. W., 1034; Jackson v. Everett (Tenn.), 58 S. W., 340; Bailey v. Happin, 12 R. I., 560; Olney v. Hull, 21 Pick., 311; Howbert v. Cawthorne (Va.), 42 S. E., 683; Graves R. Prop., 190-194; 20 Ency. L., 841; 2 Wash. R. Prop. (3d Ed.), 507-510; Pant v. Walker, 31 S. C., 13; Green v. Grant, 143 Ill., 61; Bamforth v. Bamforth, 123 Mass., 280; Strans v. Rost (Md.), 10 Atl., 74; White's Trustee v. White (Ky.), 7 S. W., 26; Ewing v. Shannahan (Mo.), 20 S. W., 1065; Bennett v. Garlock, 79 N. Y., 302; Hayes v. Tabor, 41 N. H., 521; Hill v. Bank, 45 N. H., 270; Emerson v. Hughes (Mo.), 19 S. W., 979; Baxter v. Bowyer, 19 O. St., 490.)

An early doubt crept in without foundation as to the power of the trustee to represent the *cestui que* trust in partition. That doubt is set at rest, and indeed shown never to have had any foundation, in the case of Frith v. Osborne, L. R., 3 Ch. Div., 618, where it is held that there was never really any doubt, excepting such as arose out of causeless dicta, and that upon principle and reason a trustee vested with power to sell was likewise clothed with sufficient power to make partition, and this without joining with him the *cestui que* trust. The same matter has come before a number of American courts, and has always been decided the same way, especially since statutes like our Section 3469. (Swift v. Lumber Co., 71 Wis., 476; Goodrich v. Milwaukee, 24 Wis., 422; Gallie v. Eagle, 65 Barb., 583; Phelps v. Townsley, 10 Allen, 554; Kerrison v. Stewart, 93 U. S., 155; Meeks v. Olpherts, 100 U. S., 564; Bennett v. Garlock, 79 N. Y., 302; Ewing v. Shannahan, 113 Mo., 188; Railsback v. Lovejoy (Ill.), 6 N. E., 504; Phelps v. Harris, 101 U. S., 370; Freeman on Co-Tenancy, Sec. 417; Smith v. Gaines, 38 N. J. Eq., 65.)

As to the request for findings upon certain stated things: First: Motions made during the progress of a cause, and the rulings of the court granting or denying them, must, in

order to be reviewed on appeal, be taken up on a bill of exceptions. (3 Ency. Pl. & Pr., 392; Perkins v. McDowel, 3 Wyo., 328.) Courts do not take judicial notice of their records and proceedings in other causes. (Demars v. Hickey, 13 Wyo., 371.) The court was asked to find matters of evidence. A finding should not be of the evidence, but upon an ultimate fact. (Sheldon v. Dutcher, 35 Mich., 10; Davis v. Franklin, 25 Ind., 407; Tousey v. Lockwood, 30 Ind., 153; Kealing v. Vansickle, 74 Ind., 529; Locke v. Bank, 66 Ind., 353; Smith v. Mohn, 87 Cal., 489; Schneider v. Ashworth (Minn.), 26 N. W., 233.) The plaintiffs in error have no ground of complaint because of the refusal of the court to consider and determine the rights of Mrs. Magee, who was not a party to the suit.

POTTER, CHIEF JUSTICE.

This is an action for partition, and is in this court on error. It was brought in the district court in Laramie County by Mary T. Leiter, Joseph Leiter, and others, trustees and devisees under the last will and testament of Levi Z. Leiter, deceased. The defendants were Marshall Field, trustee; James H. Pratt, and Mary T. Leiter and Joseph Leiter, executors of the last will and testament of Levi Z. Leiter, deceased.

The amended petition upon which the cause was heard alleges in substance that on June 15, 1903, and for many years prior thereto Levi Z. Leiter and James H. Pratt were tenants in common, seized and possessed of the title in fee simple of the lands, tenements and hereditaments therein described; that the said Leiter on that date and at the time of his death owned an undivided twenty-nine hundred and fourteen four-thousandths part of said lands, tenements and hereditaments, and that the said Pratt owned an undivided ten hundred and eighty-six four-thousandths part thereof; that on the date above mentioned the said Pratt conveyed by deed to the defendant Marshall Field all his said undivided part in trust, to pay the income of said property to

the said Pratt during his life time, and after his death to vest the title thereto in the children of the said Pratt, and thereby authorized the said Field to do all acts necessary to make partition or division of said property or any part thereof with the said Levi Z. Leiter; that said Field accepted said conveyance and thenceforth continued to act as trustee thereunder; that after the execution and delivery of said trust conveyance up to the time of the decease of the said Levi Z. Leiter, the latter and said Field, trustee, held and possessed said real estate as tenants in common, in the proportions above mentioned; that said Levi Z. Leiter died June 9, 1904, seized in fee simple of his said interest, and leaving personal property largely in excess of the amount required to pay all of his indebtedness, including a large amount of personal property situate in this state, and leaving no creditors in this state; that by his last will and testament which had been duly admitted to probate in said district court, Mary T. Leiter and Joseph Leiter were named and appointed as executors thereof, and that all of his said real estate was bequeathed and devised to the plaintiffs, as trustees, with full power and authority to sell and convey all or any part thereof; that letters testamentary had been duly issued to the executors so named in the will, and as such executors they are entitled to and are in actual possession of all the real estate described in the petition. It is then alleged that the said executors are made parties defendant in order that their possession and their right to the income and profits of said real estate during their period of executorship may properly be protected by the decree, and that their title and possession of such part of said real estate as may be set off to the plaintiffs, or such portions of the proceeds of the sale of any part of the said real estate which may be sold by the order of the court, may be substituted for their possession of the undivided portion of the real estate held by them as tenants in common with the other defendants. It is further alleged that as such trustees and devisees the plaintiffs have a legal right to the said undivided twenty-nine hun-

dred and fourteen four-thousandths part of the said real estate, and that in said premises they are tenants in common with the defendant Marshall Field, trustee, who as such trustee has a legal right to the said undivided ten hundred and eighty-six four-thousandths part thereof. The lands, embracing more than twenty thousand acres, are alleged to be situated in the Counties of Laramie, Johnson and Sheridan in this state, and are severally described in the petition, together with certain water rights and ditches connected therewith. The prayer of the petition is that the real estate described may be partitioned between the plaintiffs and the defendants under the direction of the court according to their respective rights and interest therein; that the interest of plaintiffs be set off to them; that commissioners be appointed by the court for the purpose of making such partition, or, in case a partition of said premises cannot be made without manifest injury to the value thereof, that then the said premises be sold by and under direction of the court, free of the rights of all the parties to the suit, and that the proceeds of any such sale be distributed to the parties entitled thereto in lieu of their respective parts and proportion in the premises according to their just rights therein; and that plaintiffs have such other and further relief as may be just and equitable.

The defendants, Marshall Field, trustee, and James H. Pratt, filed their separate answer to said petition, the material portion thereof being as follows:

"They admit that the rights and interests of the several parties, plaintiffs and defendants, named in the said amended petition, in and to the several pieces or parcels of land mentioned and described in said amended petition, are truly set forth and stated in said amended petition; and these defendants submit to such decree as this court may make in the premises, either for a partition of the said several pieces or parcels of land, or for a sale thereof, or of such parts thereof as shall be found incapable of partition without material injury to the parties interested therein,

and these defendants pray that they may have such other and further relief as may be just and equitable."

The defendants, Mary T. Leiter and Joseph Leiter, as executors, filed their separate answer admitting that the rights and interests of the several parties, plaintiffs and defendants, named in the petition are truly set forth and stated therein, and praying that their rights in the premises as admitted in the petition may be preserved in any decree that may be entered.

Upon the issues thus framed an order of partition was entered by the court which recited that the cause came on to be heard upon the petition, the answer of the defendants Field and Pratt, and the answer of the defendants Mary T. and Joseph Leiter, as executors, and that it appeared to the satisfaction of the court that each and all of said defendants had been duly notified of the bringing, pendency and demand of said action as required by law, and in their answers had consented to the partition of the premises described in the petition as therein prayed for, and that plaintiffs had a legal right and estate in said premises; and it was ordered, all parties consenting thereto, "That by the oaths of R. S. Van Tassell, Oliver Henry Wallopp and E. W. Whitcomb, judicious disinterested householders of the vicinity, upon actual view of the premises, partition be made of said lands, together with the water rights appurtenant thereto, in the following proportions, to-wit: The twenty-nine hundred and fourteen four-thousandths part thereof to the said plaintiffs, as the trustees and devisees under the last will and testament of Levi Z. Leiter, deceased, and the ten hundred and eighty-six four-thousandths part thereof to the said Marshall Field, as trustee for the said James H. Pratt, if the same can be done without manifest injury to the value thereof, and if not, that said premises be appraised at the true value thereof in money." (Then follows a detailed description of the various lands and water rights.) It was further ordered that a writ of partition issue to the sheriff of the County of Laramie commanding

him to have said partition made accordingly. A writ of partition was thereupon issued, and was subsequently returned by the sheriff as duly executed, accompanied by the report of the commissioners. The contest in the court below arose upon exceptions to that report, filed by the defendants Field and Pratt, and an intervening petition also objecting to the report filed by Hattie B. Pratt Magee, a daughter of the defendant Pratt, who asked to be made a party defendant and that all the proceedings following the filing of the petition be vacated.

The lands described in the petition and thus involved in the action compose three separate bodies or groups. About fifteen thousand acres are located in Sheridan and Johnson Counties and are generally referred to in the proceedings as the Powder River ranch or Clear Creek lands, and, for convenience, will be here designated by the latter term. The remaining lands are situated in Laramie County; one group of about twenty-five hundred acres being referred to as the Rawhide ranch or lands, and the other, comprising about twenty-seven hundred acres, as the P F ranch or Platte River lands, with an additional tract of two hundred and eighty acres about four miles distant therefrom. The P F ranch or Platte River lands, with the water rights for their irrigation, and the said two hundred and eighty-acre tract were set off and assigned by the commissioners to Marshall Field, as trustee of James H. Pratt. All the other lands and water rights were by the commissioners set off and assigned to the plaintiffs. The several tracts and water rights so set off and assigned to the respective parties are described in detail in the report.

Omitting the description of the lands, the report of the commissioners is as follows:

"We, the undersigned, the commissioners named in the writ of partition issued in this cause, and to which this report is annexed, after being each duly sworn, and after being attended by the respective parties hereto, through their counsel, and having considered such information as

was presented to us by said parties and their counsel, and after actually viewing and personally examining the premises in said writ described, and after fully informing ourselves as to the proportionate values of the said several parcels of land described in said writ and in said order, on our oaths do set off and assign to Mary T. Leiter, Joseph Leiter, Nancy Lathrop Carver Leiter, Marguerite Hyde Leiter and Seymour Morris, trustees and devisees under the last will and testament of Levi Z. Leiter, deceased, as such trustees and devisees, as their share of said premises, the following described lands and water rights situate, lying and being in the Counties of Laramie, Johnson and Sheridan, in the State of Wyoming, to-wit:" (Then follows a description of the lands and water rights so assigned to plaintiffs.) "And we do also, on our oaths, set off and assign to Marshall Field, as trustee of James H. Pratt, as his share of said premises, so as aforesaid described in said writ, the following described lands and water rights situate, lying and being in the County of Laramie, in the State of Wyoming, to-wit:" (Then follows a description of the lands so assigned to the defendant Field as trustee.) The report is signed by each of the commissioners.

The defendants Field, as trustee, and Pratt filed objections and exceptions to the report. Some of the objections were to the form of the report, viz.: That the report fails to show or purport that the estate was set apart in such lots as would be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof; that it fails to set out the facts upon which the conclusions of the commissioners were based; and that the report furnishes no facts to inform the court so that it may set apart the estate in an advantageous and equitable manner. The other objections go to the substance of the report and question the equality and fairness of the partition as made by the commissioners. In the latter respect it was charged that the partition does not set

apart the estate in such lots as would be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof, as required by statute; that it does not set apart said estate either in quantity or quality in proportion to the several interests of the owners, but is grossly unequal and inequitable between the parties interested; that the portion set out to the complaining defendants is of a value less than one-eighth of the real or total value of said estate purported to be partitioned, much less than should have been set out to them; that neither of the objecting defendants were notified of the time when the commissioners intended to view and examine the estate, nor invited to be present upon such examination, either in person or by representatives, but that the commission was accompanied by William C. Irvine, acting in the interests of the other parties to the action, and that said Irvine made suggestions and directed the movements of said commission in their view and examination of the properties, he being thoroughly familiar with the said estate, which had a large influence upon the commission; that when the examination was made the inclement and stormy weather and the fact that the ground was covered with snow made it impossible for the commission to fully and fairly view the premises, and form an accurate opinion as to the relative values of the several pieces of land involved in the partition; that the lands involved were not of equal value, and those of least value of all the lands were those set aside by said commission to said objecting defendants; that the lands assigned to the defendants are of such a character that their successful irrigation is impossible, and their productiveness less than one-fourth per acre than that of the Rawhide lands assigned to plaintiffs; that scattered throughout the surrounding townships adjacent to the Clear Creek group is a large body of leased lands held by the estate consisting of about sixteen thousand acres, which should have been taken into consideration in connection with said estate and should have

been partitioned as a part thereof, whereas they were left to be settled or disposed of as a separate estate, and that such lands are of value only to the parties obtaining the Clear Creek lands, for the reason that the last mentioned lands or ranches, together with the leased lands, constitute a single ranch proposition for the breeding and raising of cattle; that the value which the objecting defendants understood the commissioners had placed upon the various tracts of land in making their award was much less than the real value of the lands assigned to plaintiffs and much more than the real value of the lands assigned to the complaining defendants; and that the objecting defendants prior to the making of the report of the commissioners offered to accept as a just and equitable division of the estate a portion of the Clear Creek lands at a valuation considerably in excess of the valuation placed upon such lands by the commission, which offer, however, was not accepted by said commission.

The plaintiffs filed their reply to the objections denying specifically the various charges of unfairness and inequality in the partition as made by the commissioners, and the charges as to the influence of said Irvine, and the impossibility of there having been a full view of the premises and an accurate estimate of the character and value of the respective groups and tracts of lands.

Thereafter, and before the hearing upon the exceptions, an intervening petition was filed by Hattie B. Pratt Magee, a resident of the State of Illinois, in which she objected and excepted to the report of the commissioners upon the ground of its unfairness and inequality, and also to all the proceedings had subsequent to the filing of the petition upon the ground that, as one of the children of James H. Pratt, she is an interested person in all of the said lands and property under and by virtue of the trust deed executed by the said Pratt to the said Field as trustee. It was alleged that said petitioner and another daughter of said Pratt, viz., Margaret Pratt Olsson, were *cestui que trusts*

in said trust deed, being then and still the only surviving children of said Pratt; that they ought to have been named as defendants in said action and permitted to answer said petition, in the manner provided by law for non-resident defendants, or otherwise; that they were not made defendants nor served with notice of said action by publication or otherwise; that said petitioner had not consented to said proceedings or any part thereof, directly or indirectly; nor authorized the said Pratt or the said Field, or both of them, to consent thereto on her behalf; that the estate of Levi Z. Leiter had not been settled and distributed in accordance with his last will and testament, and that one year not having elapsed since the appointment of the executors, the estate was not in a position for distribution, and said petitioner believed that no partition of said property could then be made for that reason; that the other daughter of said Pratt, a resident of the Kingdom of Sweden, was also without due notice of the filing of the petition and of the proceedings in partition, and that her rights in the premises had been wholly excluded in the partition. The intervening petition prayed that the petitioner be made a defendant, that her objections be sustained, and that all the proceedings since the filing of the petition be set aside, vacated and annulled; that due notice be given to the children of said Pratt of the filing of said petition, and that said petitioner be permitted within a reasonable time to be fixed by the court to make answer to the petition filed in the action and to assert her rights therein.

It appears that upon the filing of the sheriff's return to the writ of partition with the report of the commissioners the plaintiffs and the defendant executors asked its confirmation, and the defendants Field and Pratt thereupon filed their above mentioned exceptions. Afterward, on the day of the hearing upon the motion for confirmation and the objections thereto, the complaining defendants filed a motion for leave to amend their exceptions so as to embrace an objection to any further proceedings until the

said daughters of the defendant Pratt are made parties and properly brought before the court, and given an opportunity to plead, or take such other action as may be deemed proper, and that all proceedings subsequent to the filing of the amended petition be vacated and annulled until said parties are properly before the court and under its jurisdiction. In the meantime, by permission of the court, the objecting defendants and the plaintiffs had filed affidavits in support of the exceptions and in opposition thereto respectively; and the hearing as to the controverted facts was had upon such affidavits, and possibly others filed at the time of the hearing, with the exception that Commissioners Whitcomb and Van Tassell were orally examined, the former having been called for that purpose by the defendants, and the latter by the court.

All the matters that had thus come into controversy, including the intervening petition of Mrs. Magee, appear to have been heard at the same time and they were disposed of by the same order. The court denied the petition and exceptions of the intervening petitioner and the motion of the objecting defendants for the bringing in of additional parties, the order reciting as a finding by the court in that connection that "it is not necessary at this time to make additional parties defendant in said cause as prayed for in the petition of the said Hattie B. Pratt Magee and the motion of the said defendants, nor is it necessary at this time to decide what, if any, rights the said Hattie B. Magee or any other person not made a party to the original petition in this cause may have in or to the lands described in the said petition, or any of them, under the trust deed heretofore executed by the said defendant James H. Pratt; nor the effect of the joint consent of Marshall Field, trustee, and James H. Pratt to the decree of partition and the appointment of commissioners to make partition, nor the extent to which Marshall Field, trustee, and James H. Pratt represent and bind other parties." Upon the issues joined upon the exceptions to the report of the commissioners the

court found generally for the plaintiffs, and overruled each and all of the exceptions to the report. The proceedings of the sheriff upon the writ and the report and proceedings of the commissioners were thereupon approved and confirmed and it was ordered that the said parties hold in severalty the shares set off and assigned to each respectively, as shown by said report. Exceptions were duly reserved to the several rulings and the order of confirmation; a motion for new trial was made and overruled, and that ruling excepted to, and Marshall Field, trustee, James H. Pratt and Hattie B. Pratt Magee filed their joint petition in error for a reversal of the order aforesaid.

Immediately preceding the hearing and submission of the cause in this court counsel for plaintiffs in error suggested in writing the death of Marshall Field since the institution of the proceeding in error and moved the substitution in his place as one of the plaintiffs in error of Jerome Pratt Magee, who had become successor in trust by virtue of the trust deed and had accepted and qualified as such succeeding trustee. At the same time a motion of plaintiffs in error was also presented for leave to amend the petition in error in certain respects to the end that it may show that the plaintiffs in error severally as well as jointly and severally assign the errors complained of. The motions were not consented to by defendants in error, but were taken under advisement to be disposed of upon a final consideration of the cause. The motion to amend will be passed for the present.

We do not understand the fact to be disputed that the petition in error was filed and the summons in error issued during the lifetime of Mr. Field. As required by the statute, the errors complained of were set out in the petition in error, and no further assignment of error was necessary under our practice. This court thereupon obtained jurisdiction of the cause, and it is clear that Mr. Field's death did not operate to abate the proceeding. (2 Ency. Pl. & Pr., 198, 199; 2 Cyc., 770.) That it did so operate is not

contended, but it was suggested that substitution is unnecessary and that the order made in the cause might be entered as of some date previous to the death of said party. Such a practice exists in some jurisdictions where the death of a party occurs after the submission of the cause, and the order of affirmance or reversal will be entered as of the date of submission or some subsequent date during the lifetime of the deceased party; and we are not inclined to here question the correctness of that practice in the absence of a statute preventing it. But we think the propriety of our entry of an order finally disposing of this cause as of a date prior to its submission might well be doubted. We have not gone fully into the question whether the interest of the deceased trustee is represented by the other plaintiffs in error; nor was that question argued, but we think it at least doubtful. By analogy to the practice in the district courts under the code the successor in trust would seem to be a proper party. (Rev. Stat. 1899, Secs. 3622-3638.) We are of the opinion that the substitution should be allowed. This is purely an appellate proceeding and the substituted party will succeed herein only to those rights possessed by his predecessor, and to the same extent, for the same purposes, and with the same liabilities under the order appealed from. The substitution is granted upon that understanding.

The trust deed in controversy executed by James H. Pratt to Marshall Field contains a preamble reciting in substance that said Pratt and Levi Z. Leiter are joint owners of certain tracts of land in the State of Wyoming and of certain leasehold estates in other lands in said state, and also of live stock and other personal property situated upon or used in connection with said lands, the interest of Pratt therein being ten hundred and eighty-six four-thousandths; and further reciting that: "The said Pratt is desirous of creating an interest in the said property in his children, subject to his right to receive the income derived therefrom during his life, and to that end to vest his interest in the said real and personal property in a trustee for the uses and purposes,

and upon the terms and conditions and with the powers hereinafter stated."

The deed thereupon proceeds to convey by apt words of conveyance unto said Field "all his (the grantor's) right, title, interest and estate in and to all the property, real and personal, situated and being in the State of Wyoming, which is owned in common by the said James H. Pratt and Levi Z. Leiter, * * * intending thereby to convey by this instrument to the said Marshall Field all the interest of every kind and nature which the said James H. Pratt now has in and to any property situated in the State of Wyoming, in which the said Levi Z. Leiter is also interested as part owner, whether the said property is owned by the said Pratt and Leiter as tenants in common, joint tenants, or as partners, together with all increase and additions to the said property so owned by the said Pratt and the said Leiter; the said property so conveyed, assigned and transferred by this instrument in trust, as trustee, for the uses and purposes, and with the powers hereinafter stated as follows, to-wit:

"The trustee shall have full power and authority to do all acts, and to execute all instruments in his judgment necessary or proper for the proper management, care and disposition of the said property, including the right to make partition or division of any of the said property with the said Levi Z. Leiter; to authorize or join in the sale, transfer or conveyance of any of the said property, real or personal, upon such terms and at such prices as the said trustee shall deem best; and also to join in or authorize the purchase of any new or additional personal property of any kind or description in the judgment of the said trustee necessary or proper to produce the best results and income from the said property so conveyed to the said trustee; to make improvements, to insure, to pay taxes, and to do any and all acts for the protection or to render safe and productive the property and estate hereby transferred to said trustee; and to invest and reinvest any proceeds of the property coming

into the hands of the said trustee under his trust, in either real or personal property, of any kind or description, including real estate, stocks of corporations, bonds, or loans upon real estate, it being expressly understood and agreed the said trustee shall not be liable for any loss in any way arising or occurring through any mistake in judgment or failure to act on his part, but only for wilful default.

"The written request of the said James H. Pratt to the said trustee shall be a sufficient warrant and authority for the said trustee to do any act in relation to the said trust estate, or to make, execute and deliver any instrument of any kind or nature touching or affecting the said property, or any part thereof, or to make any investment of any part of the trust fund at any time in the hands of the said trustee under this instrument. The net income derived from said trust estate shall be paid over from time to time to the said James H. Pratt, or in accordance with his written directions; and the decision of said trustee as to what is income and what is principal of said trust estate shall be conclusive upon all parties interested.

"Upon the death of said James H. Pratt the trust hereby created shall terminate and be at an end, and the trust estate then in the hands of the said trustee shall go to and vest in the children of the said James H. Pratt in equal shares, the issue of any deceased child to stand in the place of and take the share which such deceased child would have been entitled to receive if living.

"In the event of the death of the said Marshall Field during the continuance of the trust hereby created, Jerome Pratt Magee, the grandson of the said James H. Pratt, shall be successor in trust to the said Marshall Field, and shall succeed to all the trusts, estates, powers and duties by this instrument vested in the said Marshall Field, as trustee."

A good part of the argument in the briefs and on oral presentation of the case was addressed to the question of the interest secured to the daughters of Mr. Pratt by the trust deed, and the necessity of having them made parties

as a jurisdictional condition to a partition of the lands involved in the controversy. A discussion of the question thus presented may be facilitated by stating briefly the various contentions of counsel. On the one hand it is contended that Mr. Pratt's children took a vested remainder, and have a present vested interest in the lands not represented by either Pratt or Field, or both of them combined, and that without a consideration of their interest upon bringing them in as parties there can be no valid partition. It is argued in that connection that partition under the code is a civil action of an equitable nature to which the rules affecting partition in equity should be applied; and that as to parties not only equitable principles must be held to govern, but that the interest of the children of Mr. Pratt is such as to bring them within the general code provision which permits any person to be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of a question involved therein. (Rev. Stat. 1899, Sec. 3480.)

On the other hand, counsel for defendants in error maintain that the interest of the children under the trust deed is that of a contingent remainder, without any present or vested interest, and further that whether they take a vested or contingent remainder their interest was fully represented in the action by the trustee, who, as trustee of an express and active trust holding the fee of the Pratt interest, was the sole necessary party as to that interest. They also contend that the powers conferred upon the trustee are sufficiently broad to authorize him to make or consent to a partition of the premises binding upon the interest of all parties under the deed; but if not that under the statute, the children of Pratt were neither necessary nor proper parties because not tenants in common with the plaintiffs below, and that the partition was at least proper as against the life estate.

From the recital contained in the order appealed from quoted above in this opinion, it is evident that the district court entertained the view that in the absence of other parties the partition was at least effective and binding as against Pratt and his life tenancy and as against Field, trustee, to the extent that his representative title and interest might be bound without bringing into the case any other parties; and that it was therefore unnecessary upon a consideration of the report of the commissioners to determine whether that representative interest extended beyond the life estate, or the effect of the partition upon other interests whatever their character.

That view and the refusal of the court below to pass upon the interest of the intervening petitioner and her sister under the trust deed and the partition is criticised by counsel for plaintiffs in error, and they refer to it as a holding that, even though such petitioner may have rights to the property sought to be partitioned, it is not necessary that she should be heard in this case which disposes of her property. But we are inclined to doubt the justness of counsel's interpretation of the court's position. The very question that was not decided because deemed unnecessary was whether or not the partition proceedings disposed of the property of the intervening petitioner.

We shall first direct our attention to the question whether, under the rules governing compulsory partition as affected or controlled by our statute and upon the proceedings in this case up to and including the action and report of the commissioners, the plaintiffs were in the absence of the suggested additional parties entitled to partition in any respect or to any extent as against Field, trustee, and Pratt. At common law prior to the enactment of statutes upon the subject partition could be compelled only at the suit of a co-parcener either against a co-parcener or one who had succeeded to the interest of a co-parcener. The proceeding at law was by writ of partition. By Statutes 31 and 32, Henry VIII., the remedy was extended to joint tenants and tenants in common whether of estates of

inheritance or for life or years. And Mr. Freeman, in his valuable work on Co-tenancy and Partition, asserts with what seems to be good reason, though apparently contrary to an assumption of Judge Story in his work on Equity Jurisprudence, that until after the statutes above referred to courts of equity did not undertake to assume jurisdiction in partition in behalf of joint tenants or tenants in common. (Freeman on Co-tenancy and Partition (2d Ed.), 423.) It appears unquestionable, however, that at a very early period jurisdiction was entertained in equity to enforce partition even before the statutes aforesaid at the suit at least of a party entitled thereto at law, though it seems that where the title was involved in some legal objection the parties were usually required to submit the same for settlement to a common law court. But where in the case of a complication of titles the law court was unable to furnish a plain, complete and adequate remedy, the aid of a court of equity might be invoked because of its power to "promote discovery or to remove obstructions to the right, or to grant some other equitable redress." (1 Story's Eq. Juris., Secs. 650, 651.) The remedy in equity was concurrent only, and is said to have been founded upon several grounds which are summarized by Judge Story in concluding his discussion of the subject as follows: "The necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity and their ability to clear away all intermediate obstructions against complete justice." But the learned jurist further remarked that such courts in making partition follow the analogies of the law, and will decree it in such cases as the courts of law recognize as fit for their interference; though equity jurisdiction in partition is not limited to cases cognizable or relievable at law, for under some circumstances where the action could not be maintained at law equity might afford relief, as in the case of an equitable title which cannot be considered in a law court, but which equity regards as true and

perfect. (*Id.*, Sec. 658.) And Mr. Freeman states that equity generally refused to extend its authority over any species of property which could not be partitioned at law. (*Freeman on Cotenancy and Part.*, 440.) While equity would grant partition in cases incapable of relief at law because of legal objections operating as obstructions to the action of the law court, but which might be overcome through the remedial processes of a court of equity, it is not to be understood that it would furnish the remedy to estates not entitled to partition at law, unless perhaps partition should be found necessary as an incident to complete equitable relief in cases otherwise properly before the court.

In this country the remedy of partition has generally been regulated more or less by statute, and the jurisdiction under statute has been in some states vested in courts of law, and in others in courts of equity, and in still others the remedy may be pursued in either a court of law or equity; and, generally, the statutory creation or regulation of the remedy has not been considered as excluding equity jurisdiction over partition in proper cases.

It was essential to compulsory partition at common law that the property be held in co-tenancy, and none but estates in possession were bound by the judgment; it did not affect estates in remainder or contingency, and a party without possession or right to possession could not invoke the remedy, for the purpose of the action was to sever an undivided possession, and thus remove the difficulties attending a joint occupancy. As persons holding an estate in lands not entitling them to possession were not injured by the mere fact of the undivided possession legally held by others, they could not require a severance of such possession. And as the remedy acted upon the possession, a partition of estates held in remainder only without a present right of possession of any part was not enforceable; nor could partition be compelled between a tenant in possession and mere remaindermen. (*Freeman on Co-tenancy and Part.*, 439, 440; *Nichols v. Nichols*, 28 Vt., 228 (67 Am. Dec.,

699); *Hadley v. Cross*, 34 Vt., 586 (80 Am. Dec., 699); *Tabler v. Wiseman*, 2 O. St., 207; *Metcalf v. Miller*, 96 Mich., 459.) And in the absence of a statute authorizing it partition cannot be awarded in equity any more than at law of an estate in reversion or remainder. (Freeman on Co-tenancy and Part., 440; 1 Wash. Real Prop. (3d Ed.), 584; *Wilkinson v. Stuart*, 74 Ala., 198; *Desshong v. Desshong*, 186 Pa. St., 227.)

Partition might be had, however, between tenants for life or years, and also between the owner of the fee of an undivided part and the tenant for life of the other part; and in such cases it was not necessary to join the reversioner or remainderman, though the partition in the absence of the latter as a party would be of temporary duration only. Mr. Freeman says: "While the rule seems to be invariable that courts will not proceed to a partition in the absence of any of the co-tenants, yet it must be remembered that this rule is confined to co-tenants of the estate of which partition is sought. Hence a partition may be ordered of an estate for years, or for life, or of a mere equity, although the tenants of the reversion or of the legal title are not before the court." The author was there discussing the proceeding in equity. (Freeman on Co-tenancy and Part., 463.) Judge Story on this subject remarks: "Nor does it constitute any objection in equity that the partition does not or may not finally conclude the interests of all persons; as where partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not *in esse*. For the court will still proceed to make partition between the parties before the court, who possess competent present interests, such as a tenant for life, or for years. But, under such circumstances, the partition is binding upon those parties only who are before the court, and those whom they virtually represent; and the interests of third persons are not affected." (1 Story's Eq. Jur., 656.)

In *Carneal v. Lynch*, 91 Va., 114, the right was upheld of a tenant for life in one undivided moiety of property to

maintain partition against the fee simple owners of the other moiety and the owners of the estate in remainder of the moiety held by the life tenant; the statute of that state applicable to the proceeding before the court having provided fully for the sale of all contingent interests, and the bill was framed in a double aspect, having been brought for partition and a sale of the contingent estates. The statute in relation to partition provided that "tenants in common, joint tenants and co-parceners shall be compellable to make partition," etc. In a learned discussion of the subject the court said that if the life tenant of the one moiety is in law a tenant in common with the owners in fee of the other moiety, it would seem clear that he can maintain the suit to compel partition against such co-tenants; and it was held that the parties were plainly co-tenants. The court further said: "We do not perceive the force of the objection that a life tenant of a part cannot maintain a suit against his co-tenants who own the fee of the other part, for partition. There can be no doubt that the fee simple owners could maintain the suit for partition against the life tenant, as defendant, and the manner in which the parties to the suit are arranged can make no difference."

Mr. Freeman, at Section 455 of his work above cited, adds: "A tenant for life or for years could, both at law and in equity, compel a partition. He could not compel the reversioner to join with him; nor could he occasion a compulsory partition which would be binding after the termination of his estate. * * * Partition may be had on the application of a tenant for years, although the tenant of the other moiety holds in fee." (Citing *Hobson v. Sherwood*, 4 Beav., 184.) In Indiana it was said: "The right of the owner of a life interest in an undivided part of real estate, to have partition, has been recognized, and, we think, should be deemed to be established." (*Shaw v. Beers*, 84 Ind., 528.) The following cases, in addition to others that might be cited, also support the proposition that partition may be had between the life tenant of an undivided

part and the owner in fee of the other part, at the suit of either: *Arnold v. Bunnell*, 42 W. Va., 473; *Metcalfe v. Miller*, 96 Mich., 459 (35 Am. St., 617); *Biddle v. Biddle*, 117 Mich., 28; *Eisner v. Curiel*, 2 App. Div. (N. Y.), 522; s. c., 20 Misc., 245; *Jameson v. Hayward*, 106 Cal., 682 (46 Am. St., 268); *Johnson v. Brown* (Kan.), 86 Pac., 503; *Toledo Loan Co. v. Larkin*, 25 O. Cir. Ct., 209. In the New York case of *Eisner v. Curiel*, the action was between life tenants of an undivided interest, and was treated as one for the partition of the life estates only, and for that purpose other parties were held to be unnecessary.

The statutory provisions of this state relating to partition are found in the civil code. The material provisions are as follows:

"Tenants in common, and co-parceners, of any estate of lands, tenements or hereditaments within the state, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed." (Rev. Stat. 1899, Sec. 4081.)

"A person entitled to partition of an estate may file his petition therefor in the district court, setting forth the nature of his title, and a pertinent description of the lands, tenements or hereditaments of which partition is demanded, and naming each tenant in common, co-parcener or other interested person, as defendants therein." (Id., Sec. 4083.)

"If the court find that the plaintiff has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff, or all parties in interest; appoint three disinterested and judicious householders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue." (Id., Sec. 4084.)

"Before a writ of partition is issued, the person of whom partition is demanded may appear in court, in person or by attorney, and consent to a partition of the estate, agreeably to the prayer and facts set forth in the petition, which amicable partition, when made and recorded, shall be valid and binding between the parties thereto." (Id., Sec. 4088.)

Section 4085 requires the writ to be directed to the sheriff of either of the counties in which any part of the estate lies,

and to command him that, by the oaths of the commissioners, he cause to be set off to the plaintiff or each party in interest, such part and proportion of the estate as the court shall order.

Provision is made for a just valuation of the estate by the commissioners if they shall find it incapable of division without manifest injury to the value thereof, and for either party to elect to take the estate at such valuation, and if no such election shall be made, then for a sale of the property.

Manifestly the statute does not, like the statutes of some states, enlarge upon the common law with respect to the persons who may require or may be compelled to make or suffer partition. The distinguishing characteristic of tenancy in common is unity of possession or right of possession; there may also exist unity of interest and title, but that is not required. (Freeman on Cotenancy and Part., 86, 87.) There must be an equal right to the possession of every part and parcel of the subject matter of the tenancy. (Id.) It cannot be doubted that a legal title to an undivided part accompanied by possession or right of possession, whether the title be in fee or for life, gives the owner a right to maintain partition against the owner of the remaining part holding the same as a tenant in common with him. The provision of Section 4084 that if the court find that the plaintiff has a legal right to any part of the estate partition shall be ordered clouds the construction of the statute somewhat; but we are not inclined to view it as preventing one with an equitable right capable of conversion in equity into a present legal title with right of possession from obtaining full relief in one action, including partition.

The partition statute forms a part of the civil code which declares that there shall be but one form of action to be called a civil action, and abolishes the distinctions between actions at law and suits in equity, and the forms of all such actions and suits previously existing. (Rev. Stat. 1899, Sec. 3443.) An action to compel partition is therefore, we think, a civil

action, and it is so held in Ohio, from which state our code was taken. (*Perry v. Richardson*, 27 O. St., 110; *McRoberts v. Lockwood*, 49 O. St., 374.) But it does not necessarily follow that it is purely equitable in character. It may be or it may not, depending upon the nature of the titles asserted and the relief sought. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief. As Mr. Phillips says: "These provisions have neither abolished nor affected legal or equitable rights and reliefs; the object has been to avoid circuity of action and multiplicity of suits, and to simplify, facilitate, and cheapen procedure. Legal and equitable rights and defenses remain as before; the modes of asserting them are changed." (Phillips Code Pl., 163.)

At the common law partition was both a legal and an equitable remedy, that is to say, it might be afforded by either a court of law or equity. In cases without complication of any sort the jurisdiction was concurrent; depending upon varying circumstances, one court could grant the relief where the other could not. There is no substantial reason, we think, for designating the action under the code as exclusively either a legal or equitable proceeding. A particular action may be one or the other or a combination of both; or, to speak more accurately, perhaps, it may be because of the facts alleged or the relief sought invoke what was formerly essentially equitable jurisdiction, or a jurisdiction that might have been exercised by either a court of law or equity. The statute retains the writ of partition of the law courts and does not provide for an exchange of conveyances, one of the chief advantages of the former proceeding in equity. We perceive no necessity, however, for distinguishing it as belonging to either class of proceedings. To call it a civil action is enough. The question of parties, like most other questions, must be settled with regard to the issues in the case and the relief demanded.

Concerning the sufficiency of the parties before the court in the case at bar, it should be remembered that the ques-

tion was not raised until after the order adjudging that partition be had and the return of the writ with the report of the commissioners. The prayer of the intervening petition was that the order previously made and all proceedings that succeeded the filing of the amended petition be vacated and annulled, which was also the practical effect of the supplemental objections of the complaining defendants. By the objections thus interposed the validity of the judgment and proceedings in respect to jurisdiction was assailed, so that the question was not merely whether to a complete settlement of the rights of all parties interested directly or remotely in the property, the presence of all such parties was necessary; nor whether they would have been *proper* parties. The question was whether the judgment and proceedings were void.

The code provides generally that any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of a question involved therein; and that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but that when a determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in or dismiss the action without prejudice. (Rev. Stat., Secs. 3480, 3487.) The first provision (Sec. 3480) seems to carry out the equitable theory as to parties, but it does not make every one referred to a necessary party to the rendition of a valid judgment. The well known distinction between necessary and proper parties is not abolished. Upon that provision the law writers generally agree that those persons who have or claim an interest in the controversy adverse to the plaintiff are *necessary* parties, while those who, in contradistinction to the former are merely "necessary parties to a complete determination of a question involved," are, as a rule, *proper* but not *necessary* parties. (Pomeroy's Code

Rem. (3d Ed.), Sec. 333; Phillips Code Pl., Sec. 453.) A familiar illustration is found in the action to foreclose a mortgage; the mortgagor, his heir, devisee, grantee or assignee, are necessary parties, while other mortgagees or lien holders are proper parties. The action may proceed to judgment without the latter, but it will not be binding upon their interests.

The chancery rule as to parties was well stated by Mr. Justice Bradley in *Williams v. Bankhead*, 19 Wall., 563. "First, where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule; secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed without him if he can be reached; thirdly, where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

The rights of the parties in an action for partition are determined by the order which finds them to be tenants in common, ascertains and adjudges the respective shares, and orders a partition thereof, whether the order be deemed interlocutory or final. (*McRoberts v. Lockwood*, 49 O. St., 374; *Freeman*, Sec. 522.) A defect of parties plaintiff or defendant is a ground of demurrer if the defect appears upon the face of the petition, otherwise the objection may be taken by answer, and if the objection is not raised by either demurrer or answer it is deemed to be waived, unless it goes to the jurisdiction of the court. (Rev. Stat. 1899, Secs. 3535, 3536, 3537.) We suppose that in partition upon its appearing that there is such a defect of parties as to render the court without jurisdiction, appropriate orders with regard thereto may be made in the absence of an

objection raised by demurrer or answer. On the other hand, where the defect is not jurisdictional, the waiver would seem to be complete so far as the parties to the action are concerned without an objection properly raised.

As determined by the petition in the case at bar, as well as the judgment and the award, the action is one for partition between the parties to the suit. Those parties only and others, if any, virtually represented by them would be bound. We need not here determine whether under our statutes in an action between the actual tenants in common in possession the owners of reversionary interests without right of possession might be made parties; the question is, are they necessary parties? Construing a somewhat similar statute, it was held in the Michigan case of *Metcalf v. Miller*, *supra*, that the owner of an undivided part of the life estate, and also of an undivided part of the reversion, might have partition of the life estate as between himself and the other tenant thereof, but could not demand partition against the other reversioners.

In fact, as well as by the admission of the pleadings, the trustee, Field, was a tenant in common with the plaintiffs, whether he is to be regarded as holding the fee of the former Pratt interest or merely the title of the life tenant. He had at least the latter. The plaintiffs, therefore, were entitled to a partition as against him, unless there is substantial merit in the contention that they were themselves without right because of the possession of the executors of the Leiter will. We think that contention is without merit, for the reason that the executors offered no objection, but practically consented, and their possession was only that of executors during and for the purpose of administration, and not adverse, and it does not appear that the administration would be in any wise prejudiced by the partition. (*Phillips v. Dorris*, 56 Neb., 293; *Richardson v. Loupe*, 80 Cal., 490.) The statute expressly provides that for the purpose of bringing suit for partition the possession of an executor or administrator is the possession of the heirs or

devisees. (Rev. Stat. 1899, Sec. 4693; 1 Abb. Prob. Law, Sec. 430.) The intervening petitioner and her sister were neither in possession nor entitled to possession, and were not, unless represented by the trustee, tenants in common with the plaintiffs, and did not, therefore, have or claim an interest in the controversy adverse to the plaintiffs, within the meaning of Section 3480. Assuming that their reversionary interest was such as could only be represented by them in person, and as distinct and separate from the title held by the trustee, and that it might have been brought into the case, they would come within the provision of the statute permitting one to be made a party who is necessary to a complete determination of the questions involved, or within the third class mentioned by Mr. Justice Bradley, viz.: those not interested in the controversy between the immediate litigants, but having interests in the subject-matter capable of convenient settlement in the suit, and who may be made parties or not at the option of the complainant. This would give them the position of proper but not necessary parties.

We conclude on this branch of the case, therefore, that the order adjudging that partition be had and the proceedings thereunder were not void for the want of necessary parties, but that it was valid and binding between the parties to the suit. Indeed the statute so declares where the defendants have come in and consented to partition. If, as contended, the interest of the children of Mr. Pratt was not virtually represented by the trustee, or if by the terms of the trust deed the latter's appearance and consent could not and did not bind that interest, then of course those parties were not concluded by the proceedings. As they were not personally made parties, and were not necessary parties, we know of no practice or reason making it imperative even if proper, which we doubt, for the court in their absence to decide in this action what the rights of the intervening petitioner and others besides the actual parties in and to the property were, nor the effect of the joint

consent of the trustee and life tenant to the decree for partition, nor the extent to which they represented and bound other parties. Whether the situation would be different had the commissioners reported the property to be incapable of partition, and proceedings had been taken for a sale thereof, or an election to take at the appraised value had been made, need not be and has not been considered, nor do we intend to intimate any opinion upon that question.

In arriving at our conclusion, we have not been unmindful of the provisions of the partition statute requiring each tenant in common, co-parcener or other interested person, to be named as defendants. The term "other interested person" may be no doubt more or less broadly construed upon a consideration of a cause prior to judgment ordering partition depending upon the facts alleged and the remedy demanded, though we think it unnecessary to decide and we do not decide whether it is intended to embrace persons not tenants in common or co-parceners with the plaintiff in an action strictly in partition. We are of the opinion, however, that it does not prevent a partition between parties in possession as tenants in common where either or both hold less than a fee simple title, at least if the property is capable of partition. In such a case the interested persons may, it seems clear, be only the tenants in possession. Here a judgment was entered effective to the extent of adjudging partition between the tenants in possession. Whether it goes beyond that or not in consequence of the title held by the trustee and the powers conferred upon him, the district court declined to consider, and we observe no substantial reason for disturbing its action in that respect, or for this court to consider the questions involved in that inquiry.

The remaining questions relate to the report and proceedings of the commissioners and the equality of the partition. The statute is silent respecting the contents of the report and would seem to be satisfied by a report showing generally the action and determination of the commis-

sioners. We do not think that its rejection would be justified upon the sole ground of an omission in the report of the facts concerning the character and situation of the premises, nor its failure to specifically state that the partition had been equitable and advantageously made, since those matters are not expressly required to be set forth. It does not occur to us that such statements would add materially to the report. The court does not make the partition, it only acts to approve or disapprove where partition is reported. The question is not so much whether the commissioners affirm the equality and fairness of the partition as whether it is in fact equitable. The whole matter may be brought before the court as it was in this case upon exceptions to the action of the commissioners, and the court does not need a recital in the report of the facts regarding the lands involved to enable it to pass upon the question of confirmation. The statutory requirement that the estate shall be set apart in such lots as will be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof is the natural rule, and one that will be intuitively recognized by intelligent persons, such as the commissioners here unquestionably were. We think the report indicates a thorough understanding by the commissioners of their duty, and we can observe no prejudice to any party resulting from the omission to set forth in the report the things suggested.

The record discloses three recognized classes of lands connected with the Clear Creek property, exclusive of the lands held under leases. First, 3,407 acres of irrigated or irrigable lands; second, 1,700 acres contiguous to the irrigable lands, but without a water right; third, approximately 10,000 acres of dry lands, referred to as scrip lands, but which serve to command a range for live stock and furnish access to watering places. It appears from the affidavits of the commissioners considered upon the hearing of the objections that in determining the proportionate values of all the lands involved in the partition and making a division

thereof, they valued the first class of Clear Creek lands at \$22 per acre, the second class at \$8.50 per acre, and the third class at \$5 per acre; the Platte River lands at \$30 per acre, the 280-acre tract in connection therewith at \$5 per acre; and the Rawhide lands at \$35 per acre. At these values the lands set apart to the objecting defendants would be worth about \$85,000, and those set apart to the plaintiffs about \$230,000, amounts approximately equaling the proportionate shares of the respective parties.

A large number of affidavits of persons asserting a familiarity with the lands and their values were filed by the plaintiffs and defendants respectively. There appears to be very little difference in the estimate placed upon the value of the Rawhide lands; the estimates as to them varying generally from thirty-five to forty dollars an acre. There appears also to be a substantial agreement among the witnesses as to the values of the second and third classes of the Clear Creek lands; the average as to the second class being perhaps seven dollars, though some place the value as low as four dollars, a few at ten dollars, one or two as high as twenty, and a number at seven to eight dollars. The third class of those lands are quite generally agreed to be worth from four to five dollars per acre, a few only of the affidavits stating a higher value than five dollars.

There is, however, a wide disagreement between the parties and upon the evidence impossible to harmonize in relation to the value respectively of the Platte River lands and those embraced in the first class of the Clear Creek group; and the controversy as to values is substantially confined to those lands. According to the evidence on behalf of the complaining defendants below, the value of the first class or irrigable Clear Creek lands is from thirty to fifty dollars an acre, and of the Platte River lands from ten to twelve dollars an acre, though some of the affidavits filed by defendants place the value of the last mentioned lands as low per acre as seven or eight dollars, and others as high as thirteen or fifteen dollars; and in a majority of

the affidavits furnished by defendants concerning the Clear Creek first class lands their value is estimated at not less than thirty-five dollars per acre, while in others it is stated as high as forty and fifty dollars. The estimates furnished by the affidavits presented by the plaintiffs, on the other hand, run from thirty to fifty dollars an acre for the Platte River lands, and from twenty to twenty-five dollars an acre for the irrigable Clear Creek lands; but in most of such affidavits the latter are valued not to exceed twenty-two dollars an acre, and the former usually at thirty dollars. Moreover, there is a conflict in the evidence regarding the character of the lands, the extent to which they can be irrigated and rendered productive, as well as the nature of the surface and soil.

From the separate affidavits of the commissioners it appears that they were agreed upon the character, quality and values of the several groups and classes of land, and they each thereby testify to the reasonableness of the respective values, as estimated by them for the purpose of determining upon a proper division of the property. According to such affidavits, which in this particular are not controverted, the commissioners appear to have been men of large experience, long personal acquaintance with most of the lands, and possessing a general knowledge of the character, usefulness and value of lands located as these lands are. One of them shows a continuous acquaintance with the Platte River and Rawhide lands since 1858, and with the Clear Creek lands for fifteen years. It is reasonable to suppose in a matter of this kind and magnitude that the commissioners were selected because of their experience and knowledge, as well as their reputation for fairness.

The conflict upon the evidence concerning the values in controversy is so pronounced that there would seem very small ground for assurance that the vacation of the proceedings and another reference to the same or different commissioners would result in harmonizing in any material degree the contrary opinions of those competent to speak

upon the subject. The fact is well known that the honest views of equally fair and capable persons will often differ more or less widely regarding the value of real estate.

The well settled rule is that the action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases—as where the partition appears to have been made upon wrong principles, or where it is shown by very clear and decided preponderance of evidence that the partition is grossly unequal. The report of commissioners in this class of cases is regarded at least as conclusive as a verdict of a jury upon a trial at law, and will not be disturbed except upon grounds similar to those on which a verdict may be vacated and a new trial granted. Indeed, the rule is maintained by some courts that it is to be regarded with more favor than a verdict, for the reason that the commissioners are usually selected by the parties because of their superior judgment and capacity to perform this particular service, and are authorized to exercise their personal knowledge and to act upon a view of the property. (Freeman, Sec. 525.) In New Jersey it was said: "Where a partition has been actually made by commissioners, the court, by its well settled practice, interferes with their action with great reluctance. It is only where a clear mistake has been made that their proceedings will be interfered with." (*Bentley v. Long Dock Co.*, 14 N. J. Eq., 480.)

It is strenuously urged, however, that the commissioners valued the Platte River lands upon the erroneous assumption that they are susceptible of irrigation, and there is evidence in support of the view that as a rule they are not capable of successful irrigation. There is evidence also to the contrary; and we not only find the evidence as to that matter as conflicting as upon the general subject of value, but we think it impossible to say that the alleged fact of the mistake in the character of the lands has been established by a clear preponderance of the evidence. Persons possessing an apparently equal acquaintance with the lands

and capacity of judging, state different conclusions upon the probable productiveness of the lands under irrigated cultivation. A water right sufficient to irrigate them seems to have been secured and maintained. In addition to their value for cultivation, the commissioners and others regard them as peculiarly valuable as a ranch for raising live stock, owing to the surrounding range, which, it is stated by some of the evidence, is not the case with the Rawhide lands. We have examined the entire evidence in relation to this particular matter with much care, and we are not convinced that the objection upon the ground of an unequal allotment is sustained, unless the evidence on behalf of the plaintiffs be disregarded, and there is no ground for such a course. It is true that the defendants presented certain written propositions offering to accept a different division—one of them offering to pay the plaintiffs \$232,085.11 for their undivided interest in all the lands. It may be that, as suggested, propositions of that kind may operate to shake the reasonableness of the partition, when the other party prefers to rest upon the allotment of the commissioners. The propositions in this case clearly enough show that the proposer is dissatisfied with the share given him, and that he honestly believes the property given to his adversary to be of a greater value than that placed upon it by the commissioners; but upon the circumstances here they cannot take the place of the partition, nor be held sufficient to vacate it. In effect that would amount to a substitution of the judgment of one of the parties for that of the commissioners, and allow him to determine the method of the partition. We are not inclined to the opinion that where, as in the case at bar, the sworn statements of the party in relation to the values of the land are corroborated by the testimony of many other reputable and competent witnesses, his refusal to accept a proposition apparently based upon a higher valuation of the lands set apart to him and a lower valuation of those set apart to the dissatisfied party should be held sufficient to discredit the

truthfulness or honesty of his statements. The lands being capable of partition, the law does not compel the moving party to sell his interest, whatever the price offered. For reasons satisfactory to himself he may wish to retain his interest, though offered an opportunity to dispose of it at a valuation equal to or exceeding that placed upon it by the commissioners, or by himself. Although counsel for defendants in error have suggested some apparently pertinent objections to the various offers, they seem to have been made in good faith, and to indicate a deep seated conviction on the part of Mr. Pratt that his interest in the property has been unjustly discriminated against in the allotment. Whether that conviction is well founded can only be determined by the court upon all the evidence.

The fairness of the proceedings is challenged on the further ground that Mr. W. C. Irvine accompanied the commissioners on the occasion of their inspection of the lands. He was and had been for some time the general manager of these properties, and he went with the commissioners and assisted in conducting them upon the lands and pointed the same out to them, and may have answered questions relative to them. It appears that he was present at the first meeting of the commissioners, which was also attended by the representatives of the respective parties, and by Mr. Pratt, and the commissioners and the representatives of the plaintiffs each swear that they understood at that meeting, and supposed it to be understood by all parties, that the commissioners would be accompanied by Mr. Irvine, and certain occurrences are related tending to show a general understanding to that effect. Mr. Pratt and his counsel, however, unequivocally state in their affidavits that they had no such understanding or knowledge. Mr. Irvine states that he did not go as the representative of either of the parties, but merely to assist the commissioners in examining the property, and that he did not in fact influence or attempt to influence them in their action or determination; and that is corroborated by each of the commissioners. No

statement made to them by Mr. Irvine nor any act of his is pointed out as having influenced the allotment, other than the mere fact of his presence when the property was examined. It does appear that, after the commissioners had reported, and the objections had been filed, he assisted counsel for plaintiffs, at the latter's urgent request, in securing some of the affidavits filed in opposition to the objections, and Mr. Irvine, in his affidavit, values the property substantially the same as the commissioners. There is no showing, however, that he made his opinion as to the respective values known before the report was made. After the commissioners returned from viewing the property, they held several meetings discussing the matter among themselves; but Mr. Irvine does not seem to have been present at any of their deliberations. And though it was doubtless known to the defendants upon the return of the commissioners that Mr. Irvine had gone with them, no objection thereto was made until after the report had been filed. Before the filing of the report a meeting was held by the commissioners attended by representatives of both parties, and an opportunity was then offered for any additional suggestions from either side; and it appears that some suggestions were made; and finally, ten days after their return from the property, the commissioners verbally announced to the parties at a meeting held for that purpose their conclusions subsequently embodied in the report.

It is imperative, of course, that the proceedings should be fairly conducted with an equal opportunity to all parties to be heard; and the fact that secret or undue influence had been exercised by either party upon the action of the commissioners would doubtless require the vacation of their report. The presence of the manager seems to have been in perfect good faith both on his part and on the part of the commissioners, and they each positively deny any undue influence growing out of that circumstance, or that it had any influence upon the decision of the commissioners. It seems to have been the idea of the latter, as well as Mr.

Irvine, that his presence was for the purpose of pointing out the property, and assisting the commissioners in going over the premises, as representing all the parties. We are satisfied that the proceeding was free from any intentional impropriety, and we do not perceive upon the evidence any prejudice to the defendants resulting therefrom.

We think it unnecessary to decide whether the lands held by the partnership under leases from the state might have been included in the partition, or whether upon timely objection a partition could have been successfully resisted unless they were included. Defendants in error maintain that the leasehold estates constituted personal assets of the partnership in the possession of the executors consequent upon the failure of the surviving partner to furnish the bond required by statute as a condition to his retention of possession. The answers consented to a partition of the premises described in the petition, and this does not seem to have been the result of a mistake on the part of the defendants below. Whatever the general rule as to the necessity of the inclusion of all the property held in co-tenancy by the parties in a partition proceeding, we think that where the parties have thus consented to a partition of certain premises without any suggestion that other tracts are also held in similar co-tenancy, an objection on the ground of the exclusion of such other tracts ordinarily comes too late after judgment and the report of the commissioners, and especially so where there is no inherent objection to a separation of the different tracts. The lands held under lease consist, as we understand, of scattering tracts throughout the region more or less adjacent to the Clear Creek or Powder River ranches, and have been used by the partnership as a range for live stock. They are not otherwise connected with the Clear Creek lands; and cannot, we think, legitimately be said to be appurtenant to those lands, in the sense that water rights, ditches or other improvements are appurtenances. They may, we suppose, in a limited sense temporarily enhance the value of the use of

a ranch in connection with which the lessee uses them, and one of the commissioners says that he took the leases into consideration in his valuation of the Clear Creek properties. The length of time the leases have to run is not disclosed, and we know that under the statute state lands are leased for a period of five years only, with a right of renewal generally as to an area not exceeding four sections for another like period at a new appraisalment. The right to the leases or to renewals does not depend upon the ownership of adjacent ranches or lands, and it is certain that lands so leased can add nothing intrinsically to the value of other lands owned by the lessee. They may, it is true, be of considerable advantage to such owner as a range for live stock, and thereby assist materially in a business of that kind. Their value in connection with a ranch consists in furnishing grazing facilities and providing a range, and much would therefore depend in that particular upon the number of cattle or live stock maintained by the owner.

But whatever may be the relation between the leased lands and the other property in respect to the values of either, we perceive no such inherent difficulty in making partition of the property described in the petition without including the leasehold premises, as to require a vacation of the judgment and report.

We are not convinced that plaintiffs in error were prejudiced by the fact that one of the counsel for plaintiffs below prepared the report for the signature of the commissioners. The latter had previously announced their conclusions in the presence of counsel for both parties, and then requested counsel to prepare their report. We do not understand that the fact is questioned that the report as finally prepared and signed conformed in all respects with the conclusions so previously announced. A copy of the report was handed to counsel for defendants and an opportunity afforded them to suggest changes, as we understand from the evidence. They, however, concluded not to take a position apparently consenting to the report, and declined to suggest anything as to its contents.

A careful examination of the evidence fails to convince us that the proceedings were unfairly conducted; but we think the trial court was justified in concluding that the exceptions had not been sustained. Our views upon the other points in the case render it unnecessary to pass upon the motion to amend the petition in error. Finding no error in the record, the judgment will be affirmed.

Affirmed.

BEARD, Justice, and CRAIG, District Judge, concur.

HON. DAVID H. CRAIG, Judge of the Third Judicial District, sat in place of MR. JUSTICE SCOTT, who presided at the hearing in the court below.

ON PETITION FOR REHEARING.

POTTER, CHIEF JUSTICE.

Upon the petition for rehearing it is again insisted on behalf of the plaintiffs in error that the rights of the intervening petitioner, Mrs. Magee, and her sister should have been considered in the partition proceedings and those rights determined. It is also seemingly urged that there is some uncertainty in the opinion previously delivered in this cause relative to the persons bound by the judgment appealed from. Since this court did not assume to decide, but expressly declined to decide whether there were any persons other than the immediate parties to the suit who were or would be concluded by the judgment, it may be true that such question is left uncertain, but not more so than in the case of any other judgment. We are not aware of any custom or rule rendering it necessary for the court pronouncing a judgment upon the issues between the parties to a suit, to include therein a statement or determination of its effect upon other designated persons.

The first suggestion of the necessity for additional parties came after the partition commissioners had made and filed their award. The trial court declined to admit the new parties, holding it unnecessary to decide what their rights

to the lands were under the trust deed to Field, or the effect upon them of the joint consent of Field, the trustee, and Pratt, the life tenant, to the decree of partition, or the extent to which the trustee and the life tenant represent and bind other parties. Upon error in this court, therefore, the question was, in this respect, whether the suggested new parties were necessary parties to a disposition of the cause upon the issues made upon the pleadings between the parties to the suit; and we held upon the grounds set forth in the opinion that they were not. Whether or to what extent such parties are or may be bound by the proceedings and judgment was not, therefore, a question involved in this cause. We cannot conceive that the former opinion, which fully explained our views, is reasonably capable of misconstruction. The statement in the opinion that only the parties to the suit and others "virtually represented by them" would be bound, merely expressed a general principle applicable to all judgments, and was not intended to indicate whether or not any person interested in this appeal was virtually represented in the suit. Counsel seems to regard the use of the word "virtually" as throwing a cloud of uncertainty about the question. But the employment of that word in speaking of the representation by a party of others not personally named or summoned as parties is not unusual. (Story's Eq. Jur., 656; 2 Black on Judg., Sec. 661; 15 Ency. Pl. & Pr., 629.) We do not believe that a reiteration of our views upon the questions in the case and the reasons therefor would serve any useful purpose.

It is now further suggested that we overlooked the undue haste with which the proceedings in the trial court were had. We do not think that the record discloses such haste as would tend to discredit the fairness of the proceedings or the award.

Rehearing will be denied.

BEARD, J., concurs.

SCOTT, J., did not sit.

OCTOBER TERM, 1907.

LITTLETON ET AL. v. BURGESS.

CHANGE OF VENUE—APPEAL AND ERROR—BILL OF EXCEPTIONS—
INJUNCTION BOND—ACTION UPON BOND—DEFENSE OF WANT OF
JURISDICTION TO ISSUE INJUNCTION—ESTOPPEL—DAMAGES—ATTOR-
NEY FEES—PETITION—DEMURRER—PARTIES—LEGAL CAPACITY TO
SUE.

1. The action of the district court in denying a change of venue cannot be reviewed in the absence of a bill of exceptions containing the motion and affidavit in support thereof.
2. An injunction bond is properly executed in favor of the prosecuting attorney individually in a suit to enjoin him from prosecuting the plaintiff for an alleged offense under a criminal statute.
3. A party who files a petition and bond, and procures thereby an injunction to issue from a court of general jurisdiction, cannot be heard to complain, when sued on the bond, that the court granting the injunction was without jurisdiction.
4. Attorney fees incurred in procuring the dissolution of an injunction are recoverable as damages in a suit upon the injunction bond, though the ground of dissolution was the want of jurisdiction to grant the particular injunction, the court granting it being one of general jurisdiction.
5. Attorney fees so incurred are recoverable though not actually paid.
6. No relief other than injunction having been sought in the suit where a bond was given to procure a temporary restraining order, a petition in a suit upon the bond is not demurrable for failing to state separately the amount of attorney fees incurred in procuring a dissolution of the injunction and in defending the action.
7. A demurrer does not lie to a petition in a suit upon an injunction bond for alleging that certain attorney fees had been incurred in defense of the injunction suit, and in securing a dissolution of the injunction, without specifying separately the fees incurred for procuring dissolution, but the objection should be made by motion or upon the evidence.
8. In a suit upon an injunction bond given in favor of the prosecuting attorney individually in a cause against him to

enjoin a criminal prosecution, neither the state nor the county is a necessary party-plaintiff.

9. The statutory ground of demurrer that the plaintiff has no legal capacity to sue refers to legal disabilities, such as infancy and the like, and not that the plaintiff is without the necessary interest to sue in the particular action.

[Decided October 7, 1907.]

(91 Pac., 832.)

ERROR to the District Court, Sheridan County, HON. CHARLES E. CARPENTER, Judge.

The action was brought upon an injunction bond by James H. Burgess against Fred Littleton, the principal named in the bond, and his surety. Judgment was rendered for plaintiff. The defendants brought error. The material facts are stated in the opinion.

M. B. Camplin, for plaintiff in error. (*Fred H. Hathorn*, of counsel.)

The statute as to change of venue is mandatory. (*Perkins v. McDowell*, 3 Wyo., 204; *Dowling v. Allen*, 88 Mo., 293; *Route v. Ninde*, 118 Ind., 123; *Walsh v. Ray*, 38 Ill., 30; *Ins. Co. v. Tolman*, 80 Ill., 106; *Turner v. Hitchcock*, 20 Ia., 310; *Miller v. Laraway*, 31 Ia., 538; *Griffin v. Leslie*, 20 Md., 15; *Baldwin v. Marygold*, 2 Wis., 419; *Shaw v. Hamilton*, 10 Ind., 182; *Krutz v. Howard*, 70 Ind., 174; *Bixby v. Clarkaddon*, 63 Ia., 164; *Corey v. Silcox*, 5 Ind., 370; *Fish v. Turnpike Co.*, 54 Ind., 479; *Ashton v. Garretson*, 85 Pac., 831.)

The necessity for the employment of counsel is the basis for the allowance of counsel fees in suits on injunction bonds. Not alleging a necessity therefor, the petition is insufficient. The duty of defending the suit rested upon the defendant himself as prosecuting attorney. (*R. S.* 1899, Secs. 1103, 1104, 1107; *High on Inj.* (3d Ed.), 1686, 1688; *Hibbs v. Land Co.*, 46 N. W., 1119; *Littleton v. Burgess*, 82 Pac., 864.) The payment of attorney fees must be alleged. (*Macey v. Titcomb*, 19 Ind., 135; *Praeder v.*

Grimm, 28 Cal., 11.) The petition is, therefore, wholly insufficient to allow the recovery of counsel fees. (Mitchell v. Hawley, 21 Pac., 833; 45 Neb., 364; 35 Pac., 651.) The petition is further insufficient for failing to set forth the conditions of the bond, and the breach. Setting forth the bond *in haec verba* is not enough. (R. S., Secs. 3560, 3533, 3559; Johnson v. Ins. Co., 3 Wyo., 142; 1 Kinkead Code Pl., 381; 1 Whit. Code, 145.) The amount of fees for procuring dissolution of the injunction should be specified clearly and separately from fees incurred in other matters. Upon the allegation of the petition that the fees were incurred in defending the suit and securing a dissolution of the injunction, the amount expended in the latter effort is not alleged. The petition will not sustain a judgment. (Whit. Code (6th Ed.), 822; 7 O. N. P., 416; 10 O. Dec., 246; High on Inj. (3d Ed.), 1689; Cuxris v. Baehonan, 42 Pac., 911; Bustamonte v. Stewart, 55 Cal., 115; Mitchell v. Hawley, 21 Pac., 833; Lambert v. Alcorn, 21 L. R. A., 611; Olds v. Carey, 10 Pac., 786; Anderson v. Anderson, 55 Mo. App., 276; Door Co. v. Parks, 79 Ill. App., 190; Keith v. Henkleman, 173 Ill., 146 (50 N. E., 692); Landis v. Wolf, 206 Ill., 401 (69 N. E., 103); Jameson v. Bartlett, 63 Neb., 642; Church v. Baker, 71 Pac., 888; Riddle v. Cheadle, 25 O. St., 278; Newton v. Russell, 87 N. Y., 527; Trapnell v. McAfee, 77 Am. Dec., 158; Quin v. Baldwin, 78 Pac., 552, 554.) The defense of the main action involved services not necessary to the dissolution of the injunction. (85 N. W., 1016; Parker v. Bond, 1 Pac., 209; Lambert v. Haskell, 22 Pac., 327; Water Co. v. Steamship Co., 35 Pac., 651; Carnes v. Heimroad, 45 Neb., 364; Langworthy v. McKelvey, 25 Ia., 48.) Unsuccessful attempts to dissolve not an element of damage. (Pollock v. Whipple, 77 N. W., 355; Thompson v. Benson, 82 Pac., 1040; Cunningham v. Finch, 88 N. W., 168; Barr's Estate v. Post, 93 N. W., 144.) Nor services on appeal, after dissolution. (High on Inj., 1687 (3d Ed.); Thurston v. Haskell, 81 Me., 303.)

According to the petition the party enjoined was the officer, in his representative capacity—hence the bond should have run either to him in that capacity, or to his principal. Hence it is not conditioned as required by law or the order of the court. It follows no injunction ever operated in the injunction suit. The bond set forth could not be construed to be the bond required in the order of the court, or contemplated by law. (Sec. 4043 of the statute.) It is defective as a personal bond to Burgess, because the covenant is joint. It recites an order of court, in which a temporary injunction has been granted, to become effective upon the execution of a bond to defendants. The covenant is that “the plaintiff will pay said defendants and each of them all damages which they may sustain.” Surely this is not the bond contemplated by the order of the court, or provided for by law. (59 Ill., 205.) The sureties to an injunction bond stand strictly upon the precise terms of their bond, beyond which their liability cannot be extended. (Williamson v. Hall, 1 O. St., 190; High on Inj. (3d Ed.), 1635, 1638; Hall v. Williamson, 9 O. St., 17; 20 O., 93; State v. Corey, 16 O. St., 17; Smith v. Haesman, 30 O. St., 662; Lang v. Pike, 27 O. St., 498; Meyers v. Parker, 6 O. St., 501; State v. Medary, 17 O. St., 565.)

The plaintiff was not the party in interest. The damage, if any, accrued to the state. The defect appears upon the face of the petition. (R. S. 1899, Sec. 4043; 82 Pac., 864; 1 Kinkad Code Pl., 99; U. S. v. Shoup, 21 Pac., 656; City v. Randall, 66 Pac., 938; Kinkad v. Benton, 14 Pac., 294; City v. Brulo, 39 Pac., 456.) A bond to an officer is a bond to the town, and may be sued in the name of the town. (Hopkins v. Plainfield, 7 Conn., 286; Dyer v. Covington, 28 Pa. St., 186; Fairfax v. Soule, 10 Vt., 154.)

E. E. Enterline, Lonabaugh & Wenzell and C. A. Kutcher,
for defendant in error.

Unless the motion and affidavit for change of venue are incorporated in the bill of exceptions, the denial of the

motion is not reviewable on error. (Perkins v. McDowell, 3 Wyo., 328.) It would seem that the statute contemplates a change of venue only in cases triable by a jury. (R. S. 1899, Secs. 4291, 4282.) It is not allowable in cases triable by the court. (4 Ency. Pl. & Pr., 384; Dean v. Stone (Okla.), 35 Pac., 578.) The judge of another district was called in to try this case on the application of plaintiffs in error.

The defendant in error clearly had authority to employ counsel in the injunction suit against him, and it is not necessary for a recovery of the fees in a suit on the injunction bond that they should have been paid. The legal liability to pay them is sufficient. (Noble v. Arnold, 23 O. St., 264; High on Inj., 1688; Patterson v. Rinard, 81 Ill. App., 80; Reich v. Berdel, 33 Ill. App., 186; 2 Sutherland on Damages (2d Ed.), Sec. 525; Plymouth M. Co. v. Fid. & Guar. Co. (Mont.), 88 Pac., 565.) Where an injunction is the only relief sought in an action, the defendant may recover attorney's fees necessarily incurred in answering and defending the action on the merits in an action on the injunction bond, but if the injunction is only ancillary to the principal object of the action, fees can only be recovered for the services rendered in securing a dissolution of the injunction. (2 High on Inj. (2d Ed.), 1686, 1688; 2 Sutherland on Damages (2d Ed.), 525; Creek v. McMannus (Mont.), 32 Pac., 675; Thomas v. McDonald, 77 Ia., 126; Landsley v. Nietert, 42 N. W., 635; Reece v. Northway, 58 Ia., 187 (12 N. W., 258); Noble v. Arnold, 23 O. St., 264.)

The injunction suit was against Burgess, and the official title added was *descriptio personae* merely. (Breeze v. Haley (Colo.), 59 Pac., 333.) After judgment and on error the pleadings will be liberally construed. (Frontier Sup. Co. v. Loveland (Wyo.), 88 Pac., 651.) The petition was sufficient. An injunction bond will not be held defective for technical defects or informalities in its execution. (1 Spelling Inj. Rem., 933.)

SCOTT, JUSTICE.

This action was brought in the district court of Sheridan County by the defendant in error as obligee against the plaintiffs in error as obligors to recover upon an injunction undertaking given and executed by Littleton as principal and Schroeder as surety in an action wherein the said Littleton was plaintiff and the said Burgess, county and prosecuting attorney of Sheridan County, Wyoming, was defendant. The case was tried without the intervention of a jury and the court found and rendered judgment in favor of Burgess. Littleton and Schroeder bring the case here on error.

1. Plaintiffs in error (defendants below) complain that the trial court denied their motion for a change of venue. That question cannot be here considered, for the reason that there is no bill of exceptions, and the motion and affidavit in support thereof, not being pleadings in the case, can only be brought into the record by such a bill. It was so decided in *Perkins v. McDowell*, 3 Wyo., 328, and that decision has ever since been the rule of practice in this court.

2. Plaintiffs in error demurred to the petition on three grounds, viz.: First, that the petition does not state facts sufficient to constitute a cause of action; second, that there is a defect in the party plaintiff, appearing on the face of the petition, in this: that "James H. Burgess," in his individual capacity, or as an individual, is not the proper party plaintiff, but that the face of the petition discloses the proper party plaintiff to be either James H. Burgess as county and prosecuting attorney of Sheridan County, Wyoming, or the State of Wyoming; third, that the plaintiff has no capacity to sue, as disclosed from the face of the petition. The demurrer was overruled and the defendants were given time within which to plead, to which ruling they reserved an exception, and such ruling is here assigned as error.

It is alleged in the petition that James H. Burgess was the duly elected and qualified county and prosecuting at-

torney in and for Sheridan County during 1904 and 1905. That on August 20, 1904, the plaintiff in error, Littleton, commenced an action in the district court of Sheridan County against said Burgess, county and prosecuting attorney of Sheridan County, Wyoming, the object and purpose of which was to restrain and enjoin the defendant therein as county and prosecuting attorney of said county from causing the arrest and prosecution of the said Littleton for a violation of the anti-gambling law, and from further prosecuting him in a proceeding wherein he had been duly charged and arrested for a like offense. That upon application to the judge of said district court a temporary injunction was directed to issue restraining and enjoining said Burgess as such county and prosecuting attorney from causing the arrest and from prosecuting said Littleton for the alleged violations of the law, upon said Littleton giving an undertaking in the sum of one thousand dollars conditioned as required by law. Thereupon Littleton as principal and Schroeder as surety executed and filed the undertaking involved in this suit, which was approved by the clerk of the district court and the writ issued and was served upon Burgess. The undertaking is in the following words, to-wit:

"BOND FOR INJUNCTION.

"WHEREAS, In the above entitled action, a temporary injunction has been granted as prayed in said petition on file herein, the same to become effective and be in force upon the plaintiff executing a bond to the defendants in the sum of one thousand dollars, conditioned as required by law.

"Now, therefore, we, Fred Littleton, as principal, and Fred Schroeder, as surety, acknowledge ourselves to be held and firmly bound unto said defendant in the sum of \$1,000.00, conditioned that the said plaintiff will pay said defendants and each of them all damages which they may sustain if it be finally determined that said injunction ought not to have been granted.

"In witness whereof, we have hereunto set our hands this 20th day of August, A. D. 1904.

(Signed)

"FRED LITTLETON, Principal.

"FRED SCHRODER, Surety."

It is further alleged that thereafter such proceedings were had therein that on March 22d, 1905, judgment was duly entered in said cause by which it was adjudged that said temporary injunction ought not to have been granted and the action was dismissed. That thereafter upon proceedings in error this court affirmed the said judgment. That said Burgess contracted and obligated himself to pay the sum of one thousand dollars as attorney's fees in the defense of said action and to secure the dissolution of the injunction, in which sum he has been damaged and prays judgment therefor.

It will be observed that the injunctive suit was against James H. Burgess, county and prosecuting attorney of Sheridan County, Wyoming, and that the undertaking runs to James H. Burgess as an individual. It is contended that the undertaking is not such as required by law in that it was not made to the defendant in his official capacity, but to him personally, and that as such it did not constitute a basis for the issuance of the writ; and also that the writ was void because the court had no jurisdiction of the subject matter of the action. It is provided by statute that the undertaking shall be given "to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted." (Sec. 4043, R. S. 1899.) The facts alleged in the petition were not sufficient to invoke the exercise of equitable jurisdiction. It was not such an action as is contemplated by the statute in prescribing the duties of the county and prosecuting attorney. Sec. 1107, R. S. 1899, provides that the county and prosecuting attorney shall prosecute or defend for the state or county in all civil or criminal suits or proceedings at law in which the state or county is a party. Neither state nor county was a party to the action. Both were

strangers to the injunction suit, and neither had nor could have any interest in or title to the proceeds of any judgment recovered on the undertaking. In *Breeze v. Haley et al.* (Colo.), 59 Pac., 333, Breeze was temporarily enjoined as county treasurer from collecting taxes. The undertaking ran to him individually, and upon determination that the writ ought not to have been granted suit for damages was commenced on the undertaking against the obligor and his sureties. The first complaint was entitled *Lewis H. Breeze, plaintiff*, while the second amended complaint was entitled *Lewis H. Breeze, as treasurer of Routt County, plaintiff, v. Ora Haley et al., defendants*. There was no answer to the complaint, and upon admission of the fact that Breeze had ceased to be treasurer of Routt County at the time of the commencement of the action, a motion to dismiss was sustained on the ground that at the time of the commencement of the action Breeze was not the treasurer and had no authority to bring it. The plaintiff then asked leave to withdraw his second amended complaint and to substitute and reinstate his first complaint. This motion was denied and judgment of dismissal was ordered. The court of appeals reviewed the judgment and held that the words descriptive of the plaintiff in the second amended complaint were unnecessary and further said: "No considerable injury can result to the defendants by permitting the plaintiff to abandon his second amended complaint and fall back on his first." In that case it was also said: "It is true that the collection of taxes was a duty which pertained to his office as treasurer of the county, but it was a duty for the performance of which he was personally responsible." In the case before us it was a duty pertaining to the office of county and prosecuting attorney to prosecute the case for the state, and Burgess having qualified as such officer was personally liable on his official bond for a failure to do so. (Sec. 1107, R. S. 1899.) There can be no question that he had a personal interest in the defense of the injunction suit in order to avoid personal liability upon his official bond.

His authority to act in the matter of the prosecution of the criminal case was derived from his office. The state looked to him for benefits from the performance of his official duties, but whether or not he would act in the performance of those duties was a matter personal to himself. That he was about to act in the prosecution of Littleton was the matter complained of, and it was those acts which were sought to be restrained by the injunction. This being the case, it follows for the purposes of this suit that the undertaking properly ran to Burgess individually and that the action thereon was maintainable in his name. (Sec. 4043, R. S. 1899; *Breeze v. Haley et al.*, *supra*.)

That the court had no jurisdiction to enjoin the prosecution of crime by the prosecuting officer was decided by this court in *Littleton v. Burgess*, 14 Wyo., 173. It does not, however, follow that because of absence of such jurisdiction no action can be maintained upon the undertaking given and upon which the writ issued. When in such a case one invokes the power of a court of general jurisdiction he cannot thereafter be heard to say in avoidance of damages for injury resulting therefrom that the court was without jurisdiction. (22 Cyc., 1040, and cases there cited.) The district court possesses original equity jurisdiction. In *Robertson v. Smith*, 129 Ind., 428 (15 L. R. A., 273), it was alleged as a defense to an action on an injunction bond that the order granting the injunction was void for want of jurisdiction over the person of the defendant, and upon demurrer it was held insufficient to constitute a defense. The case is an instructive one and discusses the question of jurisdiction of the subject matter, as well as of the person, as affecting the right to recover in such cases. After reviewing the authorities and quoting from the opinions in *Adams v. Clive*, 57 Ala., 249; *Hanna v. McKenzie*, 5 B. Monroe, 314 (43 Am. Dec., 122); *High on Injunctions*, Sec. 1652, as sustaining the proposition that want of jurisdiction over the subject matter of the injunction suit is not a defense to an action on the injunction bond, the court

said: "We regard these authorities as establishing the proposition that, when a plaintiff files a complaint and bond, and procures an injunction to issue from a court of general jurisdiction, he is, when sued upon the bond, estopped to say that the court granting the injunction was without jurisdiction. They proceed upon the theory that it does not lie in the mouth of one who has affirmed the jurisdiction of a court in a particular matter to accomplish a purpose, to afterward deny such jurisdiction to escape a penalty." To the cases mentioned and discussed by that court may be added the following cases where want of jurisdiction over the subject matter to issue the writ was also held to be no defense to an action upon the injunction bond, and which were also referred to in that case, viz.: *Stevenson v. Miller*, 2 Litt., 310 (13 Am. Dec., 271); *Hoy v. Rogers*, 4 T. B. Monroe, 236; *Cumberland Coal & Iron Co. v. Hoffman S. C. Co.*, 39 Barb., 16. The question is so clearly set forth and the principle so clearly stated in the above quotation that it would be useless to try to enlarge upon it. We regard it as decisive of the question here presented.

It is urged that damages within the terms of the undertaking do not include attorney's fees, and that as the trial court had no jurisdiction to issue the writ there was no occasion or necessity to employ counsel. The supreme court of Alabama in *Rosser v. Timberlake*, 78 Ala., 162, said: "It is a mistake to suppose that, because there is no proof of present injury by the injunctive and restraining order, there was no occasion to employ counsel to defend it. Any suit brought, if not defended, may result in costs, if not in a more grievous wrong against defendant. It does not lie in the mouth of complainant, who has forced another into court, to claim exemption from liability on the plea that his suit was so harmless or frivolous as not to call for defense." In the case before us the plaintiffs in error forced the defendant in error into court to determine at least a question of jurisdiction—a question which was a judicial one and

which he could not determine himself—and to ignore the writ might have resulted in great wrong to him. No obligation rested upon him to ignore the writ even though it was issued without jurisdiction. (*Robertson v. Smith, supra.*) His right to defend either upon the merits or upon jurisdictional grounds accrued to him upon the service of the writ (*Walton v. Delving*, 61 Ill., 201), and by no sophistry of reasoning could he be barred of that right. The right having so accrued he had the right to be represented by counsel. If the attorney's fees were incurred to procure the dissolution of the injunction, then by the great weight of authority the defendant in error was damaged to that extent. (22 Cyc., 1053, and cases there cited; *Robertson v. Smith, supra*; *Noble v. Arnold*, 23 O. St., 265.) In the last mentioned case the court said that "a distinction is to be taken between expenses incurred only in procuring a dissolution of an injunction, and such as are incurred in the defense of an action, to which the injunction is merely auxiliary, and is not essential to the relief sought." This distinction runs all through the adjudicated cases, where such fees are allowed as an element of damage in an action upon the bond. In the case before us the object of the writ was to perpetually enjoin the defendant from doing the acts complained of and the attorney's fee was, as appears from the petition, reasonable and necessary to procure the dissolution of the temporary injunction and defeat the action. It is held by the supreme court of Kentucky that when injunction is the relief sought and in fact gives the relief if sustained no recovery for counsel fees can be had. (*Tyler v. Hamilton*, 108 Ky., 120 (55 S. W., 920); *Turnpike v. Dulaney*, 86 Ky., 518 (6 S. W., 590); *Chicago, &c., R. Co. v. Sullivan*, 80 S. W., 791.) That court apparently stands alone in drawing this distinction. We think the reasoning is better in *Reese v. Northway*, 58 Ia., 187, where it is held that attorney's fees are allowable for defending in the entire action where injunction is the only relief sought and dissolution is procured only upon final hearing.

This rule is announced and followed in *Creek v. McManus*, 13 Mont., 152 (32 Pac., 675). While the temporary injunction was dissolved by the trial court, such expenses for reasonable attorney's fees as were necessary in defending in the proceedings in error were so incurred to avoid a reversal of the order and a reinstatement of the injunction and, therefore, properly chargeable. (*Wallis v. Dilley*, 7 Md., 237.) Nor does it follow that there can be no recovery for attorney's fees incurred though not actually paid. In *Noble v. Arnold*, *supra*, the court said upon this subject: "An indebtedness incurred—a liability to pay—is a damage, and we think is sufficient to constitute a liability on the undertaking." Such is the well settled rule. (16 Ency. of Law, 469.)

It is further objected that the attorney's fees for defending the action and those necessary for obtaining a dissolution of the injunction are not itemized or separated. It is apparent from what has already been said that upon the facts alleged there can be no merit in this contention. If the facts were different then the question could be raised either by motion, or by objection to evidence during the trial, but not by demurrer. The record fails to show that any motion for an itemized bill was made, or that objections were made or exceptions taken to the admission of evidence on that ground, and even if the facts alleged disclosed the two classes of items, still the question would not be properly before us, and for that reason could not be here considered.

The second ground of demurrer is that there is a defect in the party plaintiff. This, as a statutory ground, goes to the non-joinder of necessary parties as plaintiffs. (*Powers et al. v. Bumcratz*, 12 O. St., 271, 293.) All those whose interests are in common with those of plaintiff in the subject matter of the suit should be joined as plaintiffs unless upon a refusal to join as such they may upon appropriate averments be made defendants. A failure to do either, where the defect is apparent, would render a peti-

tion demurrable on this ground. The wording of the demurrer, together with the specification of the particular defect and the argument of the counsel, indicate that the objection is rather upon the ground that the action is not brought in the name of the real party in interest. Having already held in another part of this opinion that Burgess had an interest, and that neither the state nor the county had any interest in the subject matter of the injunction suit, it follows that they were not necessary parties to the action on the bond.

That the plaintiff has no capacity to sue is not strictly speaking a ground for demurrer under our statute. The word *legal* as qualifying capacity is omitted by the pleader, and it is only when the plaintiff has no legal capacity to sue that a demurrer will lie for that cause. (Sec. 3535, R. S. 1899.) The words "legal capacity to sue," in the sense used in the statute, have a well defined meaning. They are directed to the legal disabilities of the plaintiff, and the facts showing such legal disabilities are independent of the cause of action. In *Brown, Ex'r., et al. v. Coitchell et al.*, 110 Ind., 31 (7 N. E., 888), it is said: "The want of legal capacity to sue, as a cause for demurrer, has reference to plaintiffs under legal disabilities, and not to a case where the facts alleged show that the plaintiff has no right to sue in that particular case. In such case the assignment should be that the complaint does not state facts sufficient to constitute a cause of action." It was so held in *Weidner v. Rankin et al.*, 26 O. St., 522, and *Buckingham v. Buckingham*, 36 O. St., 69. It is said in *Stang et al. v. Newberger et al.*, 6 O. N. P. Rep., 61, that "A dictum in *Saxton v. Seibert*, 48 O. St., 559, tends somewhat in an opposite direction, but it was unnecessary to a determination of the case and is inconsistent with the decision in *Weidner et al. v. Rankin et al.*, *supra*, which was seemingly overlooked by the judge rendering the opinion." It does not appear upon the face of the petition, even if the demurrer be held sufficiently specific, that the plaintiff is under any legal disa-

bility such as infancy, want of authority or any personal disability to maintain the action. It is to these matters that a demurrer upon this ground is directed. *Farrell v. Cook*, 16 Neb., 483; *Bliss Code Pl.* (2d Ed.), Secs. 407-409; *Haskins v. Olcott*, 13 O. St., 210; *Smith v. Sewing Machine Co.*, 26 O. St., 562; *Dale et al. v. Thomas et al.*, 67 Ind., 570; *Debolt v. Carter*, 31 Ind., 355.)

Our conclusion is that the demurrer was properly overruled on each and every ground. The judgment will be affirmed. *Affirmed.*

POTTER, C. J., and BEARD, J., concur.

MCGINNIS v. STATE.

CRIMINAL LAW—PRELIMINARY EXAMINATION—ROBBERY—INFORMATION—OBJECTIONS.

1. An objection that a defendant in a criminal case was not given a preliminary examination must be presented by a motion to quash if the facts appear on the record, otherwise by plea in abatement, and, if not so presented, is waived by a plea of not guilty.
2. The statute defining robbery is but a restatement of the offense at common law, and embraces all the common law elements of that offense.
3. An indictment or information for robbery is fatally defective which fails to state the ownership of the property alleged to have been taken, and charging the taking to have been "felonious" is not a substitute for an allegation of the ownership.
4. Only when the statute defining an offense fully, directly and expressly, without any uncertainty or ambiguity, sets forth all the elements necessary to constitute the offense intended to be punished, and states all the material facts and circumstances embraced in the definition of the offense, is it sufficient for an indictment or information to charge the offense in the language of the statute. Ingredients not entering into the statutory definition must be alleged.

5. An information or indictment for robbery failing to allege the ownership of the property taken, though the taking is alleged to have been felonious, is defective in substance, and the objection is not waived by not moving to quash, but can be raised by demurrer on the ground that the facts stated do not constitute an offense, and also by motion in arrest. (POTTER, C. J., dissenting.)

[Decided October 7, 1907.]

(91 Pac., 936.)

ERROR to the District Court, Converse County, HON. RODERICK N. MATSON, Judge.

Allen G. Fisher, for plaintiff in error.

The information was fatally defective in a matter of substance, in failing to allege the ownership of the property said to have been taken by force and violence. The statute is virtually a re-enactment of the common law. A man is not guilty of taking his own property from another even by violence; so there must be all the elements of larceny present to constitute robbery, and the ownership of the property taken must be alleged. (Rex v. Hull, 3 Car. & P., 409; Beale's Case, 281; Barnes v. State, 9 Tex. App., 128; Smedley v. State, 30 Tex., 214; People v. Vice, 21 Cal., 344; Com. v. Clifford, 8 Cush. (Mass.), 215; Sikes v. Com. (18 S. W., 902); Thompson v. Com., 18 S. W., 1022; People v. Hughes, 11 Utah, 100; State v. Wasson, 101 N. W. (Ia.), 1125; 2 Bishop's Cr. Proc., 1006; McLain's Cr. Law, Sec. 481; People v. Ammerman (Cal.), 50 Pac., 15; Brooks v. People, 49 N. Y., 436; State v. Dengal, 24 Wash., 49; State v. Morgan, 71 Pac. (Wash.), 723; Boles v. State, 58 Ark., 35; Hickey v. State, 23 Ind., 21; People v. Jones, 53 Cal., 58; Com. v. Brewitt, 82 Ky., 240; State v. Savage, 36 Ore., 191; State v. Rogers, 21 Mont., 143; Brown v. State, 33 Neb., 354; State v. Keeland, 90 Mo., 337; 2 East, P. C., p. 651; Long's Case, Cro. Eliz., 490; Commonwealth v. Morse, 14 Mass., 218; Houston v. Com., 87 Va., 257.)

Statutes defining robbery must be construed in the light of the common law, and the terms used are to be taken in

the sense understood at common law, unless such construction is contrary to the express terms of the statute. (Clark & Marshall on Crimes (2d Ed.), 560; State v. Calhoun, 72 Ia., 432; Houston v. Com., 87 Va., 257.) And unless expressly so provided, such statute is not to be construed as dispensing with the necessity that the property shall be that of another. (Com. v. Clifford, 8 Cush., 215.) The objection being one of substance can be raised by motion in arrest.

W. E. Mullen, Attorney General, for the State.

The objection to the information on the ground that it failed to allege the ownership of the property should have been taken by motion to quash, and not having been so raised the objection was waived by pleading not guilty. (R. S. 1899, Sec. 5326; Wilbur v. State, 3 Wyo., 268; Miller v. State, 3 Wyo., 657; Tway v. State, 7 Wyo., 74-78; State v. McCraffery, 40 Pac., 64 (Mont.) The information is sufficient under the statute defining robbery. (Anderson v. State, 28 Ind., 23.)

The essential ingredients of the offense are the felonious and forcible taking from the person of another of goods of value, and an information in the language of the statute is sufficient, although it contains no averment of ownership of the property taken. (State v. Swafford, 71 Tenn., 162; Clemens v. State, 92 Tenn., 282; State v. Corbes, 47 La. Ann., 1587.)

It is a general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and if in any case the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. (Wharton Cr. Law (6th Ed.), 364; People v. Hicks, 4 Pac., 1093 (Cal.); *In re McDonald*, 4 Wyo., 155.) Under our statute the ownership of the property taken is not made an ingredient of the offense, but

the taking must be felonious. The taking from another by violence of property belonging to the taker would probably not be a felony. The Wyoming statute is not a re-enactment of the common law definition of robbery, as contended.

BEARD, JUSTICE.

An information was filed by the county and prosecuting attorney of Converse County against the plaintiff in error, William McGinnis, for the crime of robbery. The charge contained in the information being as follows: "That William McGinnis, late of the county aforesaid, on the 12th day of December, A. D. 1905, at and in the county aforesaid, the said William McGinnis did then and there unlawfully, forcibly and feloniously take from the person of Norvil Lawrence by violence the sum of fifty dollars, and more, lawful money of the United States and of the value of fifty dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Wyoming." To this information the defendant, McGinnis, pleaded "not guilty." On the trial the jury returned a verdict of guilty against him, and he moved in arrest of judgment on two grounds: First, because the defendant had not been given a preliminary examination by an examining magistrate before the information was filed in the district court; and second, because the facts stated in the information are not sufficient to constitute an offense. The motion was denied by the court, and the defendant sentenced to a term in the penitentiary, and he brings error.

The objection that the defendant had not been given a preliminary examination, if such was the fact, and if the case was one requiring it under the provisions of Sec. 5273, R. S. 1899, should have been presented by a motion to quash if the grounds appeared upon the face of the record; otherwise by plea in abatement; and not having been so taken was waived by the plea of not guilty, by the express terms of the statute. (Sec. 5326, R. S. 1899.)

The other objection that the facts stated in the information do not constitute an offense, is one of the grounds upon

which a motion in arrest of judgment may be granted (Sec. 5418, R. S. 1899), and presents the question of the sufficiency of the information. Robbery is defined by our statute as follows: "Whoever forcibly and feloniously takes from the person of another any article of value, by violence or by putting in fear, is guilty of robbery, and shall be imprisoned in the penitentiary not more than fourteen years." This is but a restatement of the offense at common law and embraces all of the elements of robbery at common law. Blackstone defines robbery to be "the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or by putting him in fear." (2 Cooley's Blackstone (4th Ed.), Bk. 4, 242.) It is an aggravated form of larceny and there can be no robbery without larceny. Bishop states that the elements of the offense to be averred and proved are, (1) a larceny, (2) wherein the asportation is from the person, and is (3) effected by force or by putting in fear. (2 Bishop's New Crim. Procedure, Sec. 1001.) "The indictment should contain the allegations of simple larceny, with the added matter that makes the larceny robbery." (Id., Sec. 1002.) "Ownership must be alleged and proved precisely as in larceny." (Id., Sec. 1006; 4 Cur. Law, 1317.)

That the ownership of the property alleged to have been taken must be stated in an indictment or information for robbery has been generally held by the courts of last resort in those states where the question has arisen. In a recent case in the supreme court of Iowa, under a statute which provides: "If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery," it was held that the offense thus created by the statute embraces all of the elements of the crime under the common law. And that robbery is but an aggravated form of larceny both at common law and under the statute; and as larceny is defined to be the felonious taking of the property of another, an allegation of ownership is necessary in an indictment for

robbery. The indictment in that case charged that the defendant assaulted Thomas Malone, "and, with force and violence, wilfully and feloniously did steal, take and carry away from the person" of said Malone the sum of \$75. The ownership of the property was not otherwise alleged in the indictment. It was contended that the indictment was good because it charged that the defendant did "steal from the person of Malone." But the court said: "It is true we have held that the word 'steal,' used in the indictment, means a felonious taking. (State v. Griffin, 79 Ia., 568.) But we have never gone beyond this, and cannot, because of the statute already referred to." It was held that under the common law it is necessary to allege and prove ownership precisely as in larceny and that such is the rule where it is a statutory crime. (State v. Wasson, 126 Ia., 320.) In *People v. Vice*, 21 Cal., 344, the indictment was for robbery and charged that the defendant "did violently and feloniously take money of the following description * * * from the person of another, to-wit: From the person of Jesse A. Brandy by force, threats," etc. The indictment was not demurred to, but after a verdict of guilty defendant moved in arrest of judgment on the ground that the ownership of the property was not stated in the indictment, which motion was denied. On appeal the supreme court held the indictment fatally defective for the want of such allegation and reversed the judgment. And in *People v. Jones*, 53 Cal., 58, it was held that an indictment for robbery must aver every fact necessary to constitute larceny, and more. And in *People v. Ammerman*, 118 Cal., 23, the defendant was informed against for robbery and pleaded former acquittal, once in jeopardy and not guilty. The opinion recites that "an information against the defendant for the crime of robbery involving the same transaction had previously been filed, and under it defendant was arraigned, and pleaded not guilty; a jury was impaneled, the information was read and the plea stated. After the jury was sworn, and before any evidence was offered, upon motion

of the district attorney the information was dismissed and the defendant discharged. The ground for the motion was that the information did not allege the ownership of the property stolen, which was in fact true." It was held that the first information was invalid because it failed to allege the ownership of the property taken, and there was no jeopardy; and that the court did not err in instructing the jury to find for the people upon the plea of former acquittal and once in jeopardy. The California cases on the question are cited and reviewed in a later case by the court of appeals of California (*People v. Cleary*, 81 Pac., 753), and it was again held that an information for robbery, which failed to allege the ownership of the property, did not charge an offense.

We find nothing in the case of *In re Myrtle*, Cal. App., 84 Pac., 335, in conflict with the rule as stated in the other California cases. It is there said: "In the Ammerman case the taking of the property might have been for some other purpose, for the language of the information does not intimate that the object was to steal it any more than the mere naming the crime 'robbery' might tend to indicate a theft, and there being no allegation of ownership and no words used by which any inference could be drawn of ownership in one other than the defendant, except the mere possession Richard Johnson had of the money taken by Ammerman at the time. We think the decision in that case was correct." Further on in the opinion in commenting on the case of *People v. Cleary*, *supra*, it is said: "We reiterate all that was said in this opinion of *People v. Cleary* as applied to the facts in that case and in all cases of like character, where there is a plea of not guilty and a motion in arrest of judgment, and we still maintain that in all cases of robbery it must appear either from the language of the information or the plea of the defendant that the property taken is not the property of the defendant." If the information charged no offense it could not be plead in bar of a subsequent prosecution. (*State v. Brown*, 47 O. St., 102.) The

statute of Arkansas is in substantially the same language as ours, and the supreme court of that state held an indictment for robbery insufficient in failing to allege the ownership of the money charged to have been taken. The court said: "That allegation is found in all the common law precedents of indictments for robbery, and we have been unable to find any adjudged case in which it has been dispensed with under a statute similar to ours." (*Bales v. State*, 58 Ark., 35, and cases cited in the opinion.) It is stated in 18 Enc. P. & P., 1233: "It is very generally held that a conviction for larceny may be had upon an indictment for robbery"; and authorities from many states are cited in support of the text. Without extending this opinion by further quotations from decisions we deem it sufficient to cite the following cases in each of which it is directly held that an indictment or information for robbery is fatally defective which fails to allege the ownership of the property alleged to have been taken. (*State v. Dengal*, 24 Wash., 49; *State v. Morgan*, 31 Wash., 226 (71 Pac., 723); *Smedley v. State*, 30 Tex., 214; *State v. Lawler*, 130 Mo., 366; *Commonwealth v. Clifford*, 8 Cush. (62 Mass.), 215.) We have found the contrary held in but two states (Oregon and Tennessee). In *State v. Dilley*, 15 Ore., 70, the indictment followed the form prescribed by statute for an indictment for robbery, and the court said that the statute provided in express terms what should be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon, and it was upon that ground alone that the indictment was held to be sufficient, while admitting that but for the statute it would have been defective. In *Clemons v. State*, 92 Tenn., 282, the indictment was held sufficient being in the language of the statute, and cites *State v. Swofford*, 3 Lea (Tenn.), 162, but no other authority in support of the decision. In the latter case the ownership of the property was alleged to be in the person robbed.

It is contended that as the information in the case at bar charges a felonious taking, that implies a taking of

the property of another than the defendant and for that reason the information should be held sufficient. We think this contention cannot be sustained. The crime of robbery under the statute is a felony and it is proper, if not necessary, to so charge it; and the word feloniously as used in the information characterizes the acts charged in the information as being done with a criminal intent, but cannot be taken as a substitute for or to supply the place of an allegation of a fact which is an essential element to constitute the offense. Indeed, in most of the cases above cited the indictment or information contained the word "feloniously." Substantially the same question was presented in *State v. Wasson, supra*. And in *State v. Morgan, supra*, it is said: "The words 'did feloniously steal and take,' are no more effective to charge ownership of property than the words 'did feloniously take.'" Nor is it sufficient in all cases to charge the offense in the language of the statute. To be sufficient, "the words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense. Ingredients which do not enter into the statutory definition must be added." (22 Cyc., 340, and authorities cited in notes.)

We need notice but one other point contended for by counsel for defendant in error, viz.: that this objection to the information was waived by a failure to move to quash. This contention can only be based upon the fact that the information is defective. For, if, as contended, it is sufficient to charge the offense in the language of the statute, which includes the word "feloniously," then there is no defect in the information either in substance, form or in the manner in which the offense is charged, and nothing upon which a motion to quash could be based. But as we think the information is fatally defective in substance and that the facts therein stated do not constitute an offense, the objection

could be made and the question raised by motion in arrest of judgment. (Sec. 5418, R. S. 1899.)

In *United States v. McNemara*, 26 Fed Cases, No. 15701, an indictment for forcibly taking bank-notes from another, the court on motion arrested the judgment because it was not stated in the indictment, whose property the bank-notes were. And in *State ex rel. Conway v. Blake*, 5 Wyo., 107, at 123 this court said: "The only matter which has not been passed upon herein raised on the motion for arrest of judgment is the sufficiency of the indictment. No claim was made upon the argument or in the brief that the indictment does not charge an offense, and an examination of it convinces us that it is good and would support a conviction of murder in any degree." Thus clearly indicating that the sufficiency of the indictment to charge an offense may be raised by a motion in arrest. (See also *Benjamin v. State*, 121 Ala., 26; *U. S. v. Hannon*, 45 Fed., 414; *Strickland v. State*, 19 Tex. App., 518.)

Under our code of criminal procedure the defendant may demur to the information when the facts therein stated do not constitute an offense, but he does not waive that objection by a failure to do so, and may raise that question for the first time by motion in arrest. That is not, however, one of the grounds for a motion to quash, and we think it was not intended that a defect which the statute says may be taken advantage of by demurrer or motion in arrest, may also be taken by motion to quash. The motion to quash reaches defects in the form of the information, and in the manner in which the offense is charged, but does not reach the substance. If the facts stated constitute an offense, but are imperfectly stated, a motion to quash is the proper remedy; but if the facts stated do not constitute an offense, it should be challenged by demurrer or it may be done by motion in arrest. Otherwise the provision of the statute authorizing a demurrer or motion in arrest on that ground would be superfluous. If a general demurrer to the information in this case should have been sustained, then it

seems clear that the motion in arrest on the ground that the facts stated in the information do not constitute an offense should have been sustained. In *McCarthy v. Territory*, 1 Wyo., 313, a general demurrer was interposed to an indictment which was overruled and the defendant was tried and convicted, and after motions for a new trial and in arrest of judgment, the defendant was sentenced. On appeal the indictment was held bad for uncertainty and indefiniteness in not setting out the facts constituting the offense. It is there stated (p. 315) that "the general rule relating to indictments is, that they should set out affirmatively sufficient to constitute in themselves allegations to make out the offense charged, and leave nothing to be supplied by inference or proof." In the case at bar there is no direct allegation of the ownership of the property alleged to have been taken, but that fact—an essential element to constitute the offense—is left entirely to inference or to be supplied by proof. An examination of the statutes under which the decision in the *McCarthy* case was rendered discloses that the grounds for a motion to quash, plea in abatement and demurrer were the same as at present; and also provided, as does our present statute, that "the accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or plea in abatement, by demurring to an indictment, or by pleading in bar or not guilty." (Secs. 100, 101, 102, 103 and 105, p. 484, *Laws of Wyoming 1869*.) That case appears to be decisive of the question now under consideration. The statute having provided for what causes a demurrer or motion in arrest will lie, excluded the idea that such objections should be otherwise raised. (*State v. Baugham*, 111 Ia., 71; *State v. Tough*, 12 N. Dak., 425.) The present case differs from *Wilber v. Territory*, 3 Wyo., 268. There the charge was larceny as bailee, and it was alleged that the defendant was the bailee of the goods; but the facts constituting the bailment were not stated.

The effect of sustaining a motion in arrest of judgment is clearly defined in the statute. (Sec. 5420, R. S. 1899.)

It does not necessarily discharge the defendant, but if from the evidence on the trial there shall be sufficient reason to believe him guilty of an offense the court shall order him to enter into a recognizance to appear at the first day of the next term of the court. The information being fatally defective in failing to allege the ownership of the money alleged to have been taken did not state facts constituting an offense. The district court, therefore, erred in denying the motion in arrest of judgment; and for that error the judgment is reversed and the case remanded to the district court with directions to set aside and vacate the judgment heretofore entered, to sustain the motion in arrest of judgment, and for further proceedings according to law.

Reversed and remanded.

SCOTT, J., concurs.

POTTER, C. J., dissents.

POTTER, CHIEF JUSTICE (dissenting).

I am unable to agree with the other members of the court in this case. In my opinion the plaintiff in error is not in a position to question the sufficiency of the information for its failure to specifically allege the ownership of the property taken. As against the motion in arrest, as well as the objection to the introduction of evidence, the information is, in my judgment, clearly sufficient. Though it may follow, as a mere legal conclusion, the allegations of the information unquestionably, I think, negative ownership of the property on the part of the defendant, and the defect in failing to make the allegation in that respect more specific is one of uncertainty or indefiniteness which should have been objected to by a motion to quash, under our statute, and, no such motion having been made, the objection was waived by the plea of not guilty. It is true that an allegation of ownership of the property taken is essential at common law in an indictment for robbery, and I am willing to concede that such an allegation to render the

information good as against a motion to quash ought to be made under our statute, whereby the crime of robbery is defined substantially as it is defined by the rule of the common law. An allegation of ownership, however, in an indictment for robbery was not required because of any supposed materiality of the fact of ownership by any particular person, for the ownership could be laid in the person robbed or in some third person. The object of the requirement was that it should appear by the indictment that the property was not that of the defendant, since the crime of robbery would not be committed if one took his own property from another, though by force or violence or by putting in fear. The essential fact, therefore, embraced in the allegation of ownership in a robbery charge was and always has been the absence of ownership or right to the property on the part of the defendant.

It is true that at common law if ownership was not proved as alleged, it might constitute a fatal variance, but the effect of variance in that as well as other particulars has been greatly modified by our statute, as well as by the statutes of many of the states. All respect is due and conceded to the approved language of the common law in alleging ownership, but apart from its virtue of particularity it has no greater value than other appropriate words having the same effect and which clearly preclude any right to the property on the part of the defendant. At common law, and, no doubt, by express statute in several of our states, a criminal indictment or information is required to state all the material facts and circumstances comprised in the definition of the offense sought to be charged positively, and with clearness and certainty; and in charging the offense all the essential facts must be stated with particularity and not by way of legal conclusion.

Prior to the enactment of statutes limiting the same, a demurrer and a motion in arrest at common law might be made for want of sufficiency in the indictment respecting the time, place, or offense material to support the charge,

as well as on the ground that no offense was charged. Subsequent legislation in England, as well as in many if not most of the states of this Union, have restricted the application, especially of a motion in arrest and, in some respects, in many of the states of a demurrer; but it is apparent that the statutes of the various states on this subject differ widely. No state, I apprehend, has gone further, and few seem to have gone so far, than our own state in confining the objections for which a demurrer and motion in arrest may be presented. In considering the question in this case, therefore, decisions from other states may not be controlling or even persuasive as to the character of the allegation of ownership in an indictment for robbery or the effect of a lack of certainty therein, by reason of the substantial difference between the statutes of such other states and our own governing the manner of raising objections to an indictment or information. In several states a motion to quash seems to be unknown, or if allowed at all goes merely to some defect in the proceedings outside of the indictment, and in others it seems to be provided that even formal defects may be objected to either by a motion to quash or a demurrer. Hence, though it may be held in another state under a different statute that the absence of a specific allegation of ownership constitutes a fatal defect, it does not follow that it was intended to be held that the allegation was so much one of substance that without it a crime would not be alleged, but rather, and, I think, generally in most of the cases, that the defect has been held to be a fatal one because assailed by a demurrer or perhaps by a motion in arrest under a statute authorizing such a pleading or motion for less important causes than are made ground for the same by our statute.

It should be remembered that the precise technicalities of the common law in respect to the framing of a criminal indictment were adopted and required at a period when a defendant was not given as a right the benefit of counsel and was not permitted to testify in his own behalf. The

object intended to be attained by the certainty required in the allegation of an indictment was, first, that the accused should be furnished with a description of the charge sufficiently particular as to the essential facts to enable him to make his defense, and to furnish him, in case of his conviction or acquittal, protection against a further prosecution for the same act; and, second, that the court might be informed of the facts alleged, so that it might decide whether they were sufficient in law to support the conviction if one should be had. Therefore, it was held that facts and not conclusions of law, and the intent when necessary, should be set forth with particularity as to time, place and circumstances. But statutes have been enacted not only in England, but generally in our own country, rendering either unnecessary or unimportant many of the technical requirements of the common law in respect to criminal pleadings, which have been found to serve no useful purpose, and the only apparent benefit whereof was the prevention of the conviction of the guilty without offering any reciprocal protection to the innocent.

In discussing the principle that every material fact entering into an offense must be alleged with reasonable clearness, directness and precision, to the end that the indictment shall fully inform the accused of the exact charge against him, it was said by the court in Maine: "It is plain, however, that much of the usual tautology and wearisome prolixity which characterized indictments in the early period of criminal procedure can be safely avoided without any infringement of this sacred right of the citizen. It is the policy of our modern courts to encourage a more rational system of pleading, with greater directness and simplicity, with less verbiage and needless repetition." (State v. Perry, 86 Me., 427 (41 Am. St., 564.)) In considering a demurrer to an indictment in a recent case in the federal court of Georgia, the learned district judge said: "It is not impossible that at certain stages in the evolution of our criminal law, the arguments so ably ad-

vanced by the prisoner's counsel would have been regarded as controlling on the construction of an ordinary criminal indictment. There has, however, been a great advance, not only in criminal pleading, but in the interpretation placed on criminal statutes. This has been accomplished with the beneficial purpose on the part of the government to bring persons accused of crime to trial on the merits before a jury of their peers." (U. S. v. Green, 146 Fed., 778.) In 1 Bishop on Criminal Procedure (2d Ed.), Section, 322, the author states: "There has been considerable modern legislation intended to remove old technical absurdities in the indictment, yet aside from these there is really no great change; though the courts do not now give so attentive an ear as they once did to objections resting in no substantial reason." And even at common law the verdict was held to cure some defects the same as in civil cases, and the rule is stated in Bishop's New Criminal Procedure as follows: "It is that though a matter either of form or of substance is omitted from the allegation or alleged imperfectly, yet if under the pleadings the proof of it was essential to the finding, it must be presumed after verdict to have been proved, and the party cannot now for the first time object to what has wrought him no harm." (Bish. Cr. Pr., Sec 707a.)

In a recent case decided by the United State circuit court of appeals, Eighth circuit, the court said: "Learned counsel for defendant, in arguing the legal sufficiency of the present indictment, urges us to recognize and apply the criterion of the hornbooks of the law that certainty to a common intent is not sufficient, but that a high degree of certainty in every particular is required. This was anciently the fixed rule of criminal pleading, but of late years its rigidity has been somewhat relaxed. The well known canons of construction employed to ascertain the meaning of written instruments should not be ignored to secure mere technical accuracy, when that is unnecessary for the legitimate protection of the accused. Language should not be strained

either to convict or to acquit; it should receive a reasonable and fair interpretation to accomplish, on the one hand, the indispensable purpose of fairly apprising the accused of the charge against him, so that he may intelligently prepare to meet it, and be enabled to make use of an acquittal or conviction to protect himself against another charge for the same offense; and, on the other hand, to enable the government without unnecessary embarrassment to effectually enforce its laws and bring the guilty to punishment. We must so far as possible, consistently with insuring an accused person a fair and impartial trial, guaranteed to him by the constitution and laws, disregard form, imperfection of statement, and unimportant defects, which do not reasonably tend to the prejudice of the accused. This we are commanded to do by positive law (Sec. 1025, Rev. Stat.), as well as by repeated admonitions of the supreme court." (Clement v. United States, 149 Fed., 305.) The statute referred to in the above quotation is not different in substance or effect from the statute of our own state with reference to imperfections in an indictment or an information. In *Rosen v. United States*, 161 U. S., 30, Mr. Justice Harlan, delivering the opinion of the court, said: "The defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense."

With these introductory observations intended to show the modern tendency, in a general way, in the interpretation of criminal pleadings, and bearing in mind the object to be attained by the rules affecting the allegations of an indictment, we may the more intelligently approach a consideration of our statutory provisions upon the subject. In the first place, there is a general declaration that no indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected, "first, by the omission of the words 'with force

and arms' or any words of similar import; or, second, by omitting to charge any offense to have been committed contrary to a statute or statutes; or, third, for the omission of the words, 'as appears by the record'; nor for omitting to state the time at which the offense was committed, in any case where the time is not of the essence of the offense; nor for stating the time imperfectly; nor for the want of a statement of the value or price of any matter or thing or the amount of damage or injury in any case where the value or price or injury is not of the essence of the offense; nor for the want of an allegation of the time and place of any material fact, when time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; * * * nor for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime or person charged; nor for the want of the averment of any matter not necessary to be proved; *nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.*" (Rev. Stat. 1899, Sec. 5301.) Section 5302 provides as to variance as follows: "Whenever, on the trial of any indictment for any offense, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the Christian name or surname, or both the Christian name and surname, or other description whatever of any person whomsoever, therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case or may be prejudicial to the defendant."

By Section 5307 it is declared that where it is necessary to allege an intent to defraud, it shall be sufficient to allege such intent generally without alleging an intent to defraud any particular person; and that the proof need only show

the doing of the act charged with the intent to defraud. In several other particulars, unnecessary to specify, the technicalities of the common law have been removed. These statutes, in their application to this case, are important as revealing the legislative purpose to avoid the mistrial of a cause, or an acquittal merely because of some matter more or less technical not affecting the substantial rights of the accused. All provisions of law relating to indictments are expressly made to apply to informations and prosecutions and proceedings thereon. (Rev. Stat. 1899, Sec. 5317.)

While discarding many of the technical refinements of the early criminal procedure, the legislature has not been unmindful of the rights of an accused, but has granted him certain privileges not allowed at common law, which furnish a much more substantial protection to one charged with crime than many of the requirements formerly but not now regarded as essential. Among such substantial benefits now conferred upon an accused may be mentioned the right to be represented by counsel, and if unable to employ counsel to have counsel appointed to defend him at public expense; the right to testify under oath in his own behalf, or at his own election to make a statement without being sworn, and the right to have witnesses summoned to testify in his defense at public expense.

Under our criminal procedure a copy of the indictment or information for felony must be delivered to the defendant, if in jail, or, if on bail, to him or his attorney, and without his consent he cannot be required to answer an indictment or information charging felony until at least one day shall have elapsed after the service of a copy thereof upon him as aforesaid. Before arraignment it is also required that he shall be assigned counsel at his request, if he has not been able to engage any; and thereupon it is required that he be allowed a reasonable time to examine the indictment or information and prepare exceptions thereto. (Rev. Stat. 1899, Secs. 5318-5320.) Thus reasonable opportunity is afforded by the statute to a defendant

before being required to plead to the information to know the nature and character of the charge against him as therein set forth.

The statute then proceeds to prescribe the various methods for raising objections to an indictment or information. The three methods so prescribed are, first, a motion to quash; second, a plea in abatement; third, a demurrer. (Id., Sec. 5321.) "A motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in form of the indictment, or in the manner in which the offense is charged." (Id., Sec. 5322.) "A plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto." (Id., Sec. 5323.) "The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." (Id., Sec. 5324.) It is then provided: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment or information, or by pleading in bar, or not guilty." (Id., Sec. 5326.) A motion in arrest of judgment, after verdict, may be granted only for either of the following causes: (1) That the court had no jurisdiction to try the case; (2) that the facts stated in the indictment or information do not constitute an offense. (Id., Sec. 5418.) Section 5419 expressly provides that no judgment can be arrested for a defect in form.

From the provisions above mentioned, it is clear that the statutes of this state have made material changes in criminal procedure in respect to the manner of excepting to an indictment. At common law, and that is the rule under the statutes of a majority of the states, perhaps, a motion to quash is addressed to the sound discretion of the court, and, if refused, is not a proper subject of exception. Such a motion, in other words, was not regarded as one of right,

but was an appeal to judicial discretion. Originally, therefore, and, as stated by Mr. Bishop, in accord with the general practice in a large part of the states, the decision of the presiding judge on such a motion is not open for revisal by a higher court. (1 Archbold's Crim. Pr. & Pl., Waterman's Notes, 336, 337, Note 1; 1 Bish. New Crim. Pr., Sec. 761.) It is said, however, by Mr. Bishop, in the section above cited, that "In some states, in some circumstances, and in some conditions of the statutory law," a decision upon such a motion is subject to exception and reversal for error. On the other hand, at common law, and apparently in a majority of the states, a demurrer to an indictment reaches every defect in the structure thereof, whether in matter of form or substance, especially the form and substance of the part of the indictment stating the accusation. I suppose there can be no question but that under our statute an erroneous refusal to sustain a motion to quash is reviewable on error; but no doubt where the objection is merely to some matter of form in no way affecting the substantial rights of the defendant a decision upon the motion would be held to rest largely in the sound discretion of the court, and the judgment would not be reversed on error in that regard, unless it was apparent that there had been an abuse of discretion and that thereby the defendant had suffered some substantial prejudice in making his defense. Our statute, however, in prescribing the grounds for a motion to quash has gone much further than the statutes of most of the states, judging them by judicial decisions. Such grounds are not restricted to defects in the record outside of the indictment, nor to defects in the form of the indictment, but the motion may be made for any defect in the manner of charging the offense; while a demurrer is only permissible when the facts stated in the indictment do not constitute an offense punishable by the laws of the state. I am of the opinion that in thus adding to the causes for a motion to quash, and in restricting the common law grounds for a demurrer,

it was intended that mere uncertainty, indefiniteness or imperfection of statement in charging the offense should be objected to by a motion to quash and should not be subject to demurrer; and that the statute in this respect tends to explain what is meant in stating as a ground for a motion in arrest that it should be granted when the facts stated do not constitute an offense. As the ground so stated is in practically the same language as the statement of the cause for a demurrer, and as a failure to make a motion to quash is declared to waive all defects which may be excepted to by such a motion by demurring or by a plea of not guilty, or by pleading in bar, it is manifest to my mind that a motion in arrest under our statute will not lie for any cause nor for any objection to an information or an indictment which may be reached by a motion to quash; and, therefore, uncertainty in stating the offense or any material fact essential to the charge, such, for instance, as a statement of a fact by way of a legal conclusion, are not grounds for a motion in arrest. The purpose of the statute is more clearly shown by the provisions of Section 5325, which provides that when a motion to quash or plea in abatement is sustained the accused may be committed, or held to bail, for his appearance at the next term of court, unless the grounds on which the indictment was quashed are such that a new indictment cannot cure the defect.

Coming now to the information in this case, we find that it is charged that the defendant did "unlawfully, forcibly and feloniously take from the person of Norvil Lawrence by violence the sum of fifty dollars and more, lawful money of the United States, and of the value of fifty dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Wyoming."

The section of our statute defining robbery is embraced in the chapter entitled "Crimes Against the Person," while the sections defining larceny and burglary and the like are found in another chapter entitled "Crimes Against Prop-

erty." This follows the arrangement of the original act of 1890 defining crimes. By the statute, robbery is defined as follows: "Whoever, forcibly and feloniously takes from the person of another any article of value, by violence or by putting in fear, is guilty of robbery, and shall be imprisoned in the penitentiary not more than fourteen years." It is to be observed that the information charges the crime in the precise language of the statute. It will not be contended, I apprehend, that the statute does not state an offense punishable under the laws of the state. If it is robbery to "forcibly and feloniously take from the person of another any article of value, by violence, or by putting in fear" (and the statute so declares), then it is impossible, in my mind, to say with much show of reason that the offense is not charged in this information, which says that the defendant did "feloniously, forcibly and unlawfully take from the person" of the person named "by violence, the sum of fifty dollars, lawful money," etc.

It is insisted, and I willingly concede, that the statute does not intend by its definition of the crime to make one guilty of robbery who takes by violence, from the person of another, his own property. But that conclusion arises from the use in the statute of the word "feloniously." Bearing in mind that such an act would not constitute robbery at common law, we observe that it was never deemed necessary in the common law definition to say that one who takes the property of another by violence shall be guilty of robbery, but it was deemed sufficient in defining the crime by the rule of the common law to use the word "feloniously" in describing the act of taking in addition to the words embracing violence or the putting in fear. In other words, the common law definition was deemed sufficient to exclude the idea that the property taken belonged to the one who committed the act. By the same construction applied to our own statute, the definition of the crime excludes ownership by the defendant of the property taken.

The same sensible and reasonable construction applied to the information in this case just as thoroughly and con-

clusively excludes the ownership of the property by the defendant. If it be true that the defendant "unlawfully and feloniously" took the property, then it cannot be true that the property belonged to him; and it is entirely immaterial whether the property belonged to the person robbed or to some third person; and it is very doubtful, to say the least, whether, had ownership been alleged in the person robbed, the proof of ownership by another would be a sufficient variance to have affected the substantial rights of the defendant. In my opinion, therefore, there is not in this information a total omission of an allegation that the property did not belong to the defendant. It may be a legal conclusion, or the charge may be said to be uncertain as to ownership or the defect may be one of indefiniteness, but by no reasonable construction of the information is it possible to say that, notwithstanding its allegations, the defendant may have owned the property. If he owned the property taken, then he did not commit the act feloniously or unlawfully, and conversely, if he committed the act unlawfully and feloniously, as alleged, then he did not own the property. I am aware that statements may be found in some judicial decisions to the effect that under an indictment making a similar allegation the defendant might have committed every act charged and yet not be guilty of robbery. I notice such a remark in the opinion in *State v. Dengel* (Wash.), 63 Pac., 1104. The information in that case followed substantially the language of the statute defining the crime. I cannot agree with the statement that "literally, the defendant may have committed every act charged in the information, and yet not be guilty of robbery." If the defendant feloniously took the property under the circumstances alleged, then that act constituted robbery, and, though defendant might have had the right to seasonably object to the information in the proper statutory manner for the absence of a specific allegation of ownership, it is going too far to say that he could have done the act charged and yet be guiltless of the crime of

robbery. Such a statement under the common law procedure would no doubt have been substantially, though, even then not literally, true. Since at common law the indictment was required to contain the allegation of ownership, it might be said that an indictment not embracing the allegation would not show defendant's guilt, but I seriously doubt that it would have been correct to say that defendant could have committed every act charged and yet not be guilty. It would be equivalent to saying that at common law robbery is the forcible and felonious taking of personal property of value from the person of another, and yet if one did forcibly and feloniously take such property from the person of another he would not be guilty of robbery. The statement clearly involves an absurdity on its face.

The statute of Washington requires an information to be "direct and certain" as it regards (1) the party charged, (2) the crime charged, (3) the particular circumstances of the crime charged, when they are necessary to constitute a complete crime. A motion to quash is not one of the pleadings allowed. The only method of objecting to the structure of an indictment is by demurrer, and it lies, among other grounds, when the indictment does not substantially conform to the requirements of the code. It lies, therefore, in that state for uncertainty and when the charge as to any particular circumstance is not "direct and certain." Very different from our statute.

The general rule is that as to a purely statutory offense it is sufficient to charge it substantially in the language of the statute. But it is also generally held that that rule has no application as to a common law crime where the statute has defined it in generic terms, but that in such case the information or indictment would be insufficient in merely following the statute. Where, however, the statute in defining a common law crime defines it by stating all the material facts which go to make up the crime, then it is generally held sufficient, at least as against a motion in arrest, to charge the crime in the language of the statute.

Where the crime of robbery was defined as follows: "Every person who shall be convicted of feloniously taking the property of another from his person or in his presence, and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree," it was held in Kansas that the statute defined the offense, not in its generic terms, but by specifically stating the facts which constitute the offense. (State v. Seely, 69 Pac., 163.)

So far I have discussed the question from the view point that since the statute states that the facts alleged in the information shall constitute robbery, it must be held that the information itself charges that crime as against a motion in arrest. I am willing, however, to concede that in the interest of good pleading the information ought to be more direct and certain as to the ownership of the property, but I maintain that the defect in that particular could only be reached by a motion to quash, and no such motion having been made the defect was waived.

Is it possible to maintain that the defendant, upon an inspection of this information, was not thereby informed of the nature and cause of the accusation against him so as to enable him to prepare his defense? Or, is it possible to maintain that it would not furnish him a sufficient protection against a subsequent prosecution for the same offense? Or, can it be reasonably maintained that the court would not be able, upon reading the allegations, to determine whether or not a crime and what crime is charged? To each of these inquiries I think the answer must be in each case that no such position can be maintained.

Let us now examine the meaning and effect, as determined by judicial authority, of the word "felonious." While that is a technical word, it has always been held to imply a criminal intent, and, as descriptive of the act charged that it was done with intent to commit a crime, or, as said in a Montana case: "It means that the act was done with the mind bent on that which is wrong, or, with

a guilty mind." (State v. Rechnitz, 20 Mont., 488; 52 Pac., 264.) Mr. Circuit Justice Grier, in the federal court of Pennsylvania, said: "The epithet 'felonious' has reference to the intention, which must be *animo furandi* for the purpose of stealing or appropriating the thing taken." That language was used in charging a jury in a robbery case after giving the definition of robbery at common law. (U. S. v. Smith, 27 Fed. Cas. No. 16318.) In Bise v. United States, 144 Fed., 374, Judge Van Devanter, in delivering the opinion of the court of appeals, Eighth circuit, said with reference to an indictment charging the receiving of stolen goods that, "though the statute did not in terms make it an element of the crime that the stolen property should be received without the consent of the owner, or with intent to deprive him of its use and benefit, yet the statute was not designed to punish one who with lawful intent received stolen property, or where he receives it with the consent of the owner; but he further said that the words 'unlawfully, feloniously,' as used in the indictment, mean that the act which they characterize proceeded from a criminal intent and evil purpose and thus exclude all color of right and excuse for the act." In Indiana, in a robbery case, it was contended that the information was insufficient because it did not allege that the defendant had the present ability to commit a violent injury on the person of the prosecuting witness and, therefore, that the allegation as to an assault was not sufficient. The court said that the allegation as to assault was unnecessary and might be rejected without impairing the pleading, and that the offense of robbery is so described in the criminal code that it may be sufficiently charged in the language of the statute, or in equivalent terms; and further, "It consists in forcibly and feloniously taking from the person of another an article of value by violence, or by putting-in fear." The court, it is true, also said that a charge that a defendant forcibly and feloniously took from the person of another an article of value, describing it, and stating its value, and the name of

its owner, by violence, would in these respects be sufficient without any mention of an assault. Though the court thus included "the name of its owner," it was not intended, I think, to hold that that statement would be necessary. That question was not involved. Clearly the court was right in stating that the charge as set forth would be sufficient. (*Craig v. State*, 157 Ind., 574.)

The words "feloniously, purposely, and with premeditated malice," with which assault and battery was alleged to have been committed, were held sufficient to show that the offense charged was committed in a rude, insolent and angry manner, and, therefore, to constitute the offense as defined by statute. (*Hays v. State*, 77 Ind., 450; *Knight v. State*, 84 Ind., 73.)

In Indiana many objections must be taken advantage of by motion to quash, and if not, they are deemed waived. The supreme court of that state has said that "on a motion in arrest, if the indictment is found to contain all the essential elements of a public offense, even though to some extent defectively stated, it will be held sufficient." And again, "In criminal pleading, for uncertainty in the statement of the facts constituting the offense intended or attempted to be charged, an indictment or information can only be assailed or quashed by a motion to quash and never by a motion in arrest, or by an assignment here, for the first time, that the facts stated in the pleading are not sufficient to constitute a public offense." And the court again comes to the same conclusion as to the effect of the words "unlawfully, feloniously, purposely, and with premeditated malice," descriptive of the manner in which an alleged assault and battery was perpetrated, and the court says: "If it was done unlawfully and also feloniously, purposely and with premeditated malice, it was done in an angry manner, and more." (*Chandler v. State*, 141 Ind., 106.) In *Hamilton v. State*, 142 Ind., 276, the word "feloniously" was held to be used in the statute defining the offense of larceny to supply that element of the ordinary definition of larceny

implying criminal intent, and that its use in the information was, for the same purpose, entirely sufficient; and, therefore, that the indictment was not insufficient for a failure to charge that the money had been taken with the intent to deprive the owner of it. And so I say here that the word "feloniously" as used in our statute defining robbery was intended as at common law to supply the element of criminal intent and to exclude the idea that the defendant took his own property, and that the same word in the information ought to be given the same effect as against a demurrer or a motion in arrest.

In *State v. Halpin* (S. D.), 91 N. W., 605, it is held that the word "feloniously," when applied to an act, means that it was done with intent to commit the crime named in the information. In *State v. Fordham* (N. D.), 101 N. W., 888, a robbery case, it was held that an allegation that the property was wrongfully and feloniously taken covered the intent to steal and that it was not necessary to further allege that the property was taken with intent to steal it. In *Keeton v. State*, 70 Ark., 163, an indictment for robbery which alleged that the accused did feloniously and violently take certain property from the person of the prosecuting witness, by putting him in fear and against his will, is sufficient, without alleging that he "did steal, take and carry away" such property. The ground of the decision was that the words "feloniously did take from the person," as used in the indictment, imported a stealing and an asportation with intent to deprive the person of the lawful possession of the property in the goods. It is true that in that same state it had previously been held that an indictment for robbery was insufficient which failed to specifically allege the ownership of the property. (*Bolés v. State*, 58 Ark., 35.) But in that case the indictment did not have the word "steal" or "feloniously take," and, therefore, it may be said that it did not have words charging in substance or by legal conclusion or otherwise that there was an intent to steal the property.

In *Rosen v. United States*, 161 U. S., 29, it is said in the opinion delivered by Mr. Justice Harlan, that the words "unlawfully, wrongfully, and knowingly," as applied to an act or thing done, imported knowledge of the act or thing so done as well as an evil intent or bad purpose in doing such thing. It was, therefore, held that the defect in the information there being considered was not one of the total omission of an essential averment, but, at most, an inaccurate or imperfect statement of the fact; "and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

As in Arkansas, so in Washington, notwithstanding that it had been held that the omission of an allegation of ownership rendered an indictment insufficient, it has been held that to charge the asportation or taking in the language of the statute defining robbery is sufficient, and an information charging that the defendant "did forcibly and feloniously take from the person" of the prosecuting witness certain property sufficiently alleged the asportation without the use of the words "carried away." And the court cites the Arkansas case among others, and also refers to a previous case in Washington and one in California (19 Wash., 410; 123 Cal., 273), where an information was held sufficient which did not allege the asportation otherwise than in the language of the statute. (*State v. Smith*, 82 Pac., 918.) If the charge that a defendant did forcibly and feloniously take certain property from the person of a named prosecuting witness sufficiently charges the asportation and the stealing thereof, and I think the courts have rightly held such to be the case, then I must confess that I find it difficult to regard otherwise than as extremely technical and without any substantial reason the holding that in addition to those words the ownership of the property must be alleged as against a motion in arrest on the ground that a public offense is not charged. If, as the authorities all state, the object of alleging ownership is to negative defendant's

right to the property and the fact that he might have taken the property with a good intent, then clearly an allegation charging that he stole it or that he feloniously took it, thus implying that he stole it, clearly, in my opinion, negatives his ownership or the fact of a proper intent on his part. And, in such case, the defect in not specifically alleging ownership cannot be other than one of uncertainty or indefiniteness; for the essential fact that defendant stole the property is included in the allegation, and that fact would be rendered more certain or more specific by a precise allegation of ownership. Such allegation would not introduce a new element into the information, but would merely render more specific an element already there. And, under our statute, I think it entirely clear that the defect is waived if not objected to by motion to quash.

From a careful examination of the authorities upon this subject I am more than ever clearly convinced that statements in cases from other states to the effect that the absence of an allegation of ownership renders the indictment fatally defective are not even to be accepted as persuasive authority in this state unless the decisions were rendered under statutes like our own. It is evident that a statement that a failure to make such allegation constitutes a "fatal defect" may be used by a court, and I think has generally been used in the more recent cases, to indicate that it is a "fatal defect" as against an objection thereto properly raised under the statute of the particular state. To illustrate, it may no doubt be reasonably held a fatal defect in our state as against a motion to quash; but as against a motion in arrest or a demurrer that it would be waived without a motion to quash. To say that the allegation is one of substance does not meet the question, because it is evident that under our statute there may be a defect in alleging a matter of substance which would be waived if not objected to by a motion to quash. The cause for such a motion, "the manner in which the offense is charged," applies to something more than a matter of mere form in

the information. In *Wilbur v. Territory*, 3 Wyo., 268, the defect was one of substance, that is to say, it was a defect in the manner of alleging the offense. And it was held to have been waived because the substantive element was alleged in the indictment, although by a legal conclusion only. Likewise, in *Tway v. State*, 7 Wyo., 74, it was held, Mr. Justice Corn delivering the opinion, that the omission of the word "ravish" in an information for rape was waived even if required in such an information by a failure to move to quash; and the word ravish at common law was an indispensable word in charging the crime of rape.

California cases have been referred to as holding necessary an allegation of ownership in charging robbery. However, by a recent case decided in that state by one of the appellate courts, which was concurred in by the judge who wrote the opinion in the *Ammerman* case, it is evident that the defect was held to be fatal in the other cases under statutes altogether dissimilar from our own; and that it was not intended to hold that without the allegation the essential elements would not be substantially charged. In the case of *In re Myrtle*, 84 Pac., 335, a habeas corpus case, which had been instituted by one sentenced upon a plea of guilty of robbery upon an information which did not contain an allegation of ownership, but which did allege a felonious taking from the person, it was said: "It is doubtless true that a complete description of the crime of robbery includes an allegation of ownership of the property taken, or words which will at once indicate that such property is not the property of the robber, but in our opinion * * * where the complaint and information charge that the defendant 'did wilfully, unlawfully, and feloniously steal, take and carry away, from the person and immediate presence of the person robbed, certain personal property, describing it,' etc., substantially describes the crime of robbery in the language of the code defining it, and, no objection being made by either demurrer or motion in ar-

rest of judgment, the defendant cannot, after sentence, and on a writ of habeas corpus, be heard to say that no offense is charged." And it was held in concluding the opinion that the allegations of the information, upon defendant's plea of guilty, established a case of robbery as completely as if there had been a specific allegation of ownership.

Under the California code a motion in arrest may be founded on any defect in the indictment or information for which a demurrer may be filed, unless waived by a failure to demur; and a demurrer may be filed on several grounds, one ground being that the information does not substantially conform to the requirements of the statute as to the contents of an indictment or information. And the statute prescribing what an indictment or information shall contain says, among other things, that it must be direct and certain as regards (1) the party charged, (2) the offense charged, (3) the particular circumstances of the offense charged when they are necessary to constitute a complete offense. (Penal Code of California, Secs. 1185, 1004, 952.) The code of Iowa, from which state a case has been referred to, provides that a motion in arrest of judgment may be made for any ground which would have been a ground for demurrer; and a demurrer may be filed on the ground among others that the indictment does not substantially conform to the requirements of the code; and the code requires that the indictment must be direct and certain in the same respects exactly as stated in the California code. It would seem, however, in Iowa that a failure to demur does not necessarily waive the right to move in arrest. (Code of Iowa, 1897, Secs. 5426, 5328, 5282.)

The proposition is further illustrated by the California case of *People v. Mead*, 78 Pac., 1047, which was a prosecution under the statute charging the defendant with the crime of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution. On a motion in arrest it was contended that the statute was not to be construed literally as forbidding a husband to permit his

wife to be placed in a house of prostitution for an innocent purpose, such as a cook or seamstress, and that the crime would not be complete without allegation and proof that the wife was left in such a house with the intent on the part of the husband that she should herself act as a prostitute. The court conceded for the purposes of the case that if the objection had been raised by demurrer for uncertainty the information would be fatally defective. But as there was no demurrer and, therefore, a motion in arrest was waived for a mere insufficiency in the indictment which did not go to the idea that no offense was at all charged it was held that the words "wilfully, unlawfully, and feloniously" which described the act of defendant in placing his wife in a house of prostitution were to be given some effect in construing the language of the information, and that they excluded an act which was by law innocent. And it was remarked that the most that can be said in criticism of the information is that it may not be direct and certain as to the particular circumstances of the offense; and that such an objection is waived by failure to demur.

In California it is also held that a person imprisoned under an indictment which does not charge a public offense may obtain his discharge on a writ of habeas corpus. (*Ex parte Goldman*, 88 Pac., 819.) In connection with the Myrtle case this goes to show that the defect in failing to allege the ownership did *not* render the information *insufficient as failing to state a public offense*, because if it did *then* there must have been a discharge of the prisoner in the Myrtle case; but the only defect it is plain was one of uncertainty in stating the particular circumstances of the offense.

The criminal code of Ohio is like our own as to a motion to quash. And there are several cases in that state to the effect that any defect short of one which renders the information entirely insufficient to charge a public offense must be raised by motion to quash. (*Carper v. State*, 27 O. St., 572.) It was said in *State v. Messenger*, 63 Ohio State,

398, at page 400: "A motion to quash is under our code of criminal procedure, the proper method of raising an objection to the indefiniteness of the averments of an indictment, and is waived by demurring to it." The court further says as giving a reason for the statute: "Where a motion to quash is sustained the party may be held to plead to a new indictment in which the error in the former one has been corrected. But on the sustaining the demurrer, the defendant is entitled to his discharge; for a court cannot assume that he is guilty of an offense not charged." And in Indiana, where a motion to quash may be made for many defects, it is settled that for mere defects or uncertainties a motion in arrest will not be sustained, although such defects or uncertainties might be *fatal* on a *motion to quash*. (Campton v. State, 140 Ind., 442; Woodworth v. State, 145 Ind., 276.)

These cases serve also to illustrate what I have said that, though a case may be found holding a certain "defect" to be "fatal," does not necessarily mean that it renders the information insufficient to state an offense, but it may, and I think in most cases does, mean only that it is a fatal defect as against the particular objection raised, such as a motion to quash or a demurrer; although in most cases the defect may be one merely of uncertainty, lack of precision or failure to make the charge specific as to some particular element.

I am thoroughly convinced that our statute was intended to make a demurrer and motion in arrest proper in only two cases: (1) Where the offense charged, though sufficiently charged, is not an offense under our laws either because the act creating it is unconstitutional and void, or because there is no statute or other law making the act a crime, and (2) where some necessary element of the offense is not contained in the information *in any way*, either by specific allegation, legal conclusion, or by necessary implication of the words used. Where the allegations of the information taken in their ordinary technical significance

necessarily include every element of the offense, and the only objection is that some particular element is not made sufficiently specific, then, in my opinion, the defect must be reached by a motion to quash, and if not objected to in that manner it must be held waived by a demurrer or a plea of not guilty.

The evil of any other rule or any other construction of our statute is well exemplified by the case at bar. I cannot imagine for one moment that the defendant was unaware of the nature and cause of the accusation against him, or that by the information he was rendered unable to properly prepare his defense. It is very clear to my mind that he went into the trial with astute counsel fully equipped to present his defense as completely as the facts would warrant without any deprivation of right in that respect by reason of the alleged imperfection of the information. Had he felt that his rights would have been better protected by an allegation of ownership of the property taken, he could have made a motion to quash on the ground that such allegation was omitted from the specific allegations, and in my opinion he ought to have raised the objection in that manner. The court could then have quashed it, a new information could have been filed, perhaps immediately, and unless the defendant desired himself to delay a trial, a trial could probably been had the same term of court upon a new information. It may be that now, caused by lapse of time, it will be impossible to obtain the necessary witnesses, and the defendant, by reason of the technical objection made for the first time after the swearing of the jury, may be allowed to go free without a proper punishment for a crime of which the jury found him to be guilty.

I am most seriously impressed with the necessity of taking a broad view of these statutes and of giving effect to the intention of the legislature which I believe has been reasonably and clearly expressed, and which unquestionably depart very far from the common law method of criminal procedure, rendering the decisions under the old method,

and under statutes dissimilar to our own, either misleading when applied to our own procedure, or of very little, if any, authority. In my opinion the judgment should be affirmed.

MAYOTT ET AL. v. KNOTT.

JUSTICE COURTS—APPEALS—DISMISSAL OF APPEAL—APPEAL BOND—
CONSTRUCTION—SURETY—JUDGMENT.

1. An order of the district court is necessary to dismiss a perfected appeal from justice court.
2. An appellant cannot dismiss his perfected appeal from justice court by a mere entry of dismissal upon the docket of the district court.
3. The act of appellant in entering upon the docket a dismissal of his appeal from justice court does not divest the district court of jurisdiction to try the case *de novo*.
4. One who signs as surety an undertaking for costs and stay of execution on an appeal from justice court assumes the obligations imposed by the statute authorizing it.
5. Upon a trial *de novo* in the district court of a case appealed from a justice of the peace, a judgment against the appellant is properly rendered against him and his sureties in the undertaking to stay execution, in accordance with the statute authorizing that procedure.

[Decided October 11, 1907.]

(92 Pac., 240.)

ERROR to the District Court, Laramie County, Hon. RODERICK N. MATSON, Judge.

R. B. Knott brought suit against Annie Mayott in justice court and obtained judgment. Defendant appealed to the district court, and thereafter attempted to dismiss the appeal by an entry on the docket of that court. On motion of plaintiff the court reinstated the case and it proceeded to trial, resulting in a judgment for the plaintiff and against the defendant, the appellant, and her surety in the undertaking given to stay execution pending the appeal. The

judgment defendants thereupon brought error. The other material facts are stated in the opinion.

D. W. Elliott and Ray E. Lee, for plaintiffs in error.

The appellant had a right to dismiss the appeal. (Hart v. R. Co.; R. S., Secs. 4398, 4401, 4407, 4408; Fahey v. Fahey, 32 Colo., 25; Lumber Co., 4 Wash., 260; Adkinson v. Gahan, 114 Ill., 21; Harper v. Albee, 10 Ia., 389; Simonson v. R. Co., 48 Ia., 19; Thorp v. Thorp, 40 Ill., 113; Eden M. Co. v. Yohe, 32 Neb., 452; R. Co. v. Hammond, 25 Kan., 208; State v. Curtis, 29 Kan., 384; Muckey v. Pierce, 3 Wis., 307; Ring v. Graves, 90 Ill. App., 269; Baker v. Lawrence, 26 Ill., 53.) True this was begun as an attachment suit. But the judgment was merely a personal one, and did not order the sale of the attached property. The judgment, therefore, dissolved the attachment proceedings. Moreover, there was no showing that the attached property was worth the amount of the judgment. A different rule as to dismissal does not, therefore, obtain by reason of the attachment. The dismissal of the appeal did not affect the undertaking. It remained a valid obligation, so that the appellee was not prejudiced by dismissal.

The judgment against the surety in the undertaking was not warranted by the proceedings under which the appeal was carried to the district court, nor by the pleadings. (R. S., Secs. 4398, 4401, 4408, 4413; 5 Cyc., 752, 758; Johnston v. Dunn, 75 Minn., 533; State v. Gramm, 7 Wyo., 329; Road Co. v. Stockton, 43 Ind., 328; Hart v. R. Co.; 2 Beach on Contracts, 216.) The judgment against him was not warranted by the terms of the undertaking, but is contrary thereto. (5 Cyc., 751, 753, 756, 758; Lowe v. Guthrie, 4 Okla., 287; Swain v. Graves, 8 Cal., 549; R. Co. v. Swinburne, 22 Ore., 574; Robinson v. Epping, 24 Fla., 237; Field v. Rawlings, 6 Ill., 581; Wells v. Mehl, 25 Kan., 25; Tucker v. Tucker, 35 Mich., 365; State v. Gramm, 7 Wyo., 329.) If the statute attempts to authorize

a judgment in the appeal case against the surety it violates Section 6 of Article I of the constitution, which prohibits the deprivation of life, liberty or property without due process of law. The statutes do not authorize such a judgment. (R. S., Secs. 4398, 4401, 4403, 4408, 4412; 5 Cyc., 756; *Sturgis v. Rogers*, 26 Ind., 1; *Mullen v. Whitmore*, 74 N. C., 477.)

Clyde M. Watts, for defendant in error.

The plaintiff in error, having appealed this case to the district court, could not dismiss the appeal without the consent of the plaintiff, or an order of court. (R. S., Secs. 4401, 4412; *Loucheine v. Strouse*; *Merrill v. Dearing*, 24 Minn., 179; *Bingham v. Waterhouse*, 32 Tex., 468; *Peterson v. Frey*, 109 Mich., 681; *Sweeney v. Coulter*, 109 Ky., 295; *Weiman v. Delger*, 46 N. Y. Super., 101; *Cartledge v. Sloan*, 124 Ala., 506; *State v. Judge*, 24 La., 598; *Cleveland, &c., Co. v. Duffey*, 22 O. St., 206; *Atta-way v. Dyer*, 8 Ga., 184; *Ranson v. Coleman*, 45 Ga., 316; *Shannon v. Barnwell*, 4 Mart., 213.)

This was an attachment suit and the property was in the hands of the constable until after the appeal was taken. Having given a sufficient bond to pay any judgment against her in the district court, defendant was allowed to sell the attached property. If she could then write a dismissal on the docket leaving the plaintiff without the attached property, and only with a judgment that as far as she was concerned is worthless, there certainly would be a miscarriage of justice. That the appeal was taken solely for the purpose of delay is apparent on the record.

Assuming that the plaintiff in error had a right to dismiss her appeal, she waived that right by going to trial and introducing evidence. (17 Ency. L. (2d Ed.), 1064; *Randolph v. Ralls*, 16 Ill., 29; *Gaeger v. Dos*, 29 Ala., 341; *Smith v. Arapahoe Co.*, 4 Colo., 235; *Yaeger v. Henry*, 39 Ill. App., 22; *Schader v. Hoover*, 37 Ia., 654; *Bank v. Ins. Co.*, 83 Ia., 491; *Davis v. Packard*, 6 Wend., 327.)

A surety, by signing an appeal bond, submits himself to the jurisdiction of the court, and becomes liable to judgment for the original cause of action against his principal. (2 Cyc., 962; Greer v. McCarter, 5 Kan., 17; Holbrook v. Inv. Co., 32 Ore., 104; Beall v. New Mex., 16 Wall., 535.) The statute authorizing judgment against him is not unconstitutional.

SCOTT, JUSTICE.

Defendant in error recovered judgment against Annie Mayott, one of the plaintiffs in error, in a justice of the peace court in Laramie County. Mayott appealed to the district court and gave an undertaking on appeal in the usual form, with Idelman, the other plaintiff in error, as surety. Thereafter the case was docketed and set for trial in the district court, after which Mayott attempted to dismiss her said appeal by an entry upon the docket. A motion was made by the defendant in error, the appellee in that court, to reinstate and redocket the appeal, which motion the court granted. The case was thereafter tried without the intervention of a jury and the court found and rendered judgment in favor of Knott and against said Mayott, the appellant therein, and also against Idelman, the surety on the appeal undertaking. Mayott and Idelman bring the case here on error.

1. It is urged that the district court erred in reinstating and redocketing the appeal over the objection of the plaintiffs in error. Our statute provides that upon appeal from the judgment of a justice of the peace the case shall be docketed; that the plaintiff and defendant in the justice court shall be plaintiff and defendant respectively in the district court; and that the case shall be tried *de novo* and upon the pleadings and issues filed and made in the court appealed from. (Chap. 32, S. L. 1903, and Sec. 4401, R. S. 1899.) Section 4402, R. S. 1899, is as follows: "The district court may, at its discretion, allow amendments to the record or to any pleadings filed, in the furtherance of

justice, but when the appeal shall be dismissed by reason of any irregularity in taking or consummating the same, the clerk of the district court shall certify to the justice the order of dismissal, and shall remit with such order all papers returned by the justice. The justice may thereupon issue execution as if no appeal had been taken." The regularity of the appeal in the case before us was not questioned. The appeal having been perfected, the district court had jurisdiction to try the case *de novo* as provided by the statute. The judgment appealed from was by such appeal vacated, subject only to revival by a dismissal of the appeal. (Railroad Co. v. Hammond, 25 Kan., 208.) In the last named case, which was under statutes similar to ours and which provides for proceedings in error or by appeal from the judgment of a justice of the peace, Mr. Justice Brewer said: "If on the appeal a new judgment is rendered either way, the judgment before the justice never comes into life again; but if the appeal is dismissed, no new trial is necessary to revive and rehabilitate the former judgment." The effect of the dismissal of the appeal under Section 4402, *supra*, would be to reinstate the judgment of the justice with power of the latter to issue execution upon the same when the clerk of the district court to which the appeal had been taken "shall certify to the justice the order of dismissal and shall remit with such order all papers returned by the justice." From this language it is clear that the dismissal of the appeal must be upon an order. Such dismissal revives, and in effect is an affirmation of, the judgment appealed from.

A judgment owes its existence and validity to the exercise of judicial power and in this respect is beyond the power of any individual. No individual act of the appellant could operate to revive the judgment in the justice court, for by the terms of the statute the justice is powerless to enforce it in the absence of the certified order of dismissal from the clerk of the district court. The word order as used in that sense must mean the order referred

to and defined by the statute. An order dismissing an appeal carries out of court the action itself and constitutes a final order within the definition of the statute as contained in Section 4247, R. S. 1899, and which is as follows: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter." Section 4249 is as follows: "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors appearing on the record." From these sections it follows that an order dismissing an appeal from a justice court must be made by the district court and must appear upon the record of that court; and that the attempted dismissal of the appeal by the appellant's own entry upon the docket did not amount to an order of dismissal and was not sufficient to satisfy the requirement of these sections. The question is not whether the appellant would be entitled to an order of dismissal upon a motion therefor, but whether independent of such motion or order he could dismiss his appeal.

In *Merrill v. Deering*, 24 Minn., 179, the appeal was from the district to the supreme court, and in opposition to a motion to affirm the judgment the appellant presented a motion dismissing the appeal, served upon the respondent and filed, with proof of service, with the clerk. That court held that the supreme court having acquired jurisdiction it could not be deprived of the same at the mere will of the appellant. The court said: "He (meaning the appellant) should make application to the court for leave to dismiss. A mere notice that he dismisses is a nullity." In *Weiman v. Dilger*, 46 N. Y. Super. Ct., 101, the court said: "The notice that the appeal was withdrawn did not discontinue the appeal. An order was necessary to accomplish that * * *." To the same effect are *Cart-*

ledge v. Sloan, 124 Ala., 506, and State ex rel. Graham v. Judge, 24 La., 598. The order dismissing an appeal from a justice court may be upon motion of one of the parties or by consent of the parties, but no act of theirs can be substituted for an order of dismissal which is judicial in character and which, unless based upon the consent of the parties, is appealable. Such an order is based upon a judicial determination of the question as to whether the appellant has taken the necessary steps to entitle him to a trial *de novo* or has waived his right thereto. The following cases arose upon an order in each case denying the appellant's motion to dismiss his appeal. (Railroad Co. v. Hammond, 25 Kan., 208; Eden Musee Co. v. Yohe, 32 Neb., 452 (55 N. W., 866); Bacon v. Lawrence, 26 Ill., 53; Adkinson v. Gahan, 114 Ill., 21 (28 N. E. Rep., 380); State v. Monarty, 20 Ia., 595; 90 Ill. App., 269; Harper v. Albee, 10 Ia., 389; Hart v. Railway Co., 122 Wis., 308.) The foregoing are a few of the many cases showing the manner of preserving the question in the record for review and the general understanding of the profession as to the necessity for such an order. The record fails to show any such order and we are of the opinion that the attempted dismissal was a nullity. The court never lost jurisdiction over the case and the motion to reinstate the appeal was evidently made under a mistaken idea as to the effect of the entry made by appellant upon the docket and was superfluous; and further, if the case had lost its place upon the trial docket, it could have been and was reset for trial. This, as shown by the record, was done and the case was tried *de novo*.

2. Plaintiff in error, Idelman, objects to the judgment against him on the appeal undertaking. He was surety thereon and thereby conditionally entered his appearance in the case. The judgment runs against "Annie Mayott and Samuel Idelman, her surety." It is urged that Idelman was not a party to the original action, nor a party thereto on appeal; that the judgment against him is contrary to

the language and obligation of the undertaking and that the court erred in rendering an entirely different judgment from that appealed from.

The surety signed the undertaking for costs on appeal and stay of execution and thereby assumed all the obligations contained therein, and submitted himself to the jurisdiction of the court on the appeal to enforce the obligations thereby assumed. The undertaking must be construed in the light of the statutes in force at the time of its execution. Section 4408, R. S. 1899, is as follows: "When an appeal shall be dismissed or quashed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking, if there be an undertaking, shall be liable to the appellee for the whole amount of the debt, costs and damages recovered against the appellant." Section 4412 is as follows: "In all cases of appeal from a justice's court, if the judgment of the justice be affirmed, or if, on trial anew in the district court, the judgment be against the appellant, such judgment shall be rendered against him and his sureties in the undertaking, if there be an undertaking." The undertaking is statutory, and while there is no authorization in the undertaking to enter judgment against the surety, yet the authority and jurisdiction to do so flows from the statute. (2 Cyc., 962.) When the surety signed the undertaking he authorized it to be filed in the case and also the entry of judgment against him on the conditions contained in Section 4412, *supra* (2 Cyc., 961 and 964, and authorities there cited.) The district court did not exceed its jurisdiction, but acted clearly within the powers conferred upon it by statute in the entry of the judgment against the principal and Idelman as surety in the undertaking.

The judgment will be affirmed.

Affirmed.

POTTER, C. J., and BEARD, J., concur.

MATTHEWS v. BLAKE.

DEEDS—EXECUTION BY PUBLIC OFFICERS—TAX DEEDS—EXECUTION—
VALIDITY—LIMITATION OF ACTIONS—POSSESSION UNDER VOID DEED.

1. Where the statute requires the deed of a public officer to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging in that manner is a part of the execution of the deed, and unless so witnessed or acknowledged it is void on its face.
2. A tax deed not acknowledged before the clerk of the district court as required by statute is void on its face, and is therefore not admissible as evidence to prove title or right of possession in the grantee, or that the land had been sold for non-payment of taxes.
3. Possession under a tax deed, void on its face, does not set in motion the special statute of limitations as to the recovery of property sold for taxes contained in Section 1861, Revised Statutes 1899.

[Decided November 2, 1907.]

(92 Pac., 242.)

ERROR to the District Court, Crook County, HON. CARROLL H. PARMELEE, Judge.

Van Cise & Grant and Metz & Sackett, for plaintiff in error.

To give a tax deed any semblance of validity in states having no statute of presumption, every successive step in the tax proceedings must be pleaded and proven. (Black Tax Titles, 155, 443, 446; *Norris v. Hall* (Mich.), 82 N. W., 832; *Hecht v. Boughton*, 2 Wyo., 385; *Wolcott v. Holland*, 27 O. C. C., 71; 2 *Cooley Taxation*, 916, 1004.) Assessment is the jurisdictional pre-requisite to taxation. The property must be correctly described to validate a tax sale. (Black Tax Titles, 112; *Matthews v. Nefsy*, 13 Wyo., 458; *Van Cise v. Carter*, 9 S. D., 234; *Moon v. S. L. Co.* (Utah), 76 Pac., 222; *Kruse v. Fairchild* (Kan.), 85 Pac., 303; *Alleman v. Hammond* (Ill.), 70 N. E., 661; *O'Day v. McDonnell* (Mo.), 80 S. W., 895; *Brown v.*

Reeves (Ind.), 68 N. E., 604; City v. Farrar, 89 N. Y. S., 1035; Smith v. Brothers (Miss.), 38 So., 353; Paine v. Trust Co., 136 Fed., 527; N. P. Ry. Co. v. Kurtzman, 82 Fed., 243; Stout v. Mastin, 139 U. S., 151; Bird v. Benlisa, 142 U. S., 664; 1 Cooley on Taxation (3d Ed.), 597.) Assessment in the wrong name is invalid and a sale passes no title. (Hecht v. Boughton, 2 Wyo., 285; Ferguson v. Kaboth (Ore.), 73 Pac., 200; Brown v. Hartford (Mo.), 73 S. W., 140; Jungk v. Snyder (Utah), 78 Pac., 168; Bird v. Benlisa, 142 U. S., 664; Rich v. Braxton, 158 U. S., 375; Marx v. Hanthorn, 148 U. S., 172; Black on Tax Titles, Sec. 105; 1 Cooley on Taxation (3d Ed.), 729.) Levy is a jurisdictional fact to be pleaded and proven. (R. S. 1887, Sec. 3822; Black Tax Titles, 205, 213; 2 Cooley The so-called description in the tax list amounts to none at all, being all abbreviated, and without anything to indicate what denomination is intended by the figures denoting valuation, whether dollars or cents. (Moran v. Thomas (S. D.), 104 N. W., 212; Turner v. Hand Co., 11 S. D., 346; Power v. Larrabee, 2 N. D., 141; Power v. Bowdle, 3 N. D., 107; Keith v. Hayden, 26 Minn., 212; Kern v. Clarke, 60 N. W., 809; Black on Tax Titles, Sec. 114.) A warrant for collection is imperative. (R. S. 1887, Secs. 3807-8; 1 Cooley Tax'n., 793) There should have been evidence of the filing of a delinquent list. (Noble v. Amoretti, 11 Wyo., 230.) Publication of notice of sale is jurisdictional. (R. S. 1887, Sec. 3822; Black Tax Titles, 205, 213; Cooley Tax'n., 928.) So a posting of notice of sale on the court house door. (Black Tax Titles, Sec. 213; 2 Cooley Tax'n., 928; Shepherd v. Kahle (Wis.), 97 N. W., 506.) A tax sale without notice, or on a defective notice, is void as made without jurisdiction. (Williams v. Chaplin (La.), 36 So., 859; Fennimore v. Bootner (La.), 36 So., 860; Lambert v. Shamway (Colo.), 85 Pac., 89; McKinnon v. Nixon (Ala.), 29 So., 690; Martin v. Barbour, 34 Fed., 701; 2 Cooley Tax'n., 929-30.)

The tax deed was void on its face: (a) The attempted description by meaningless abbreviations. (b) A sale of

non-contiguous tracts *en masse* would render such a sale void, and any deed pursuant thereto void. (Black Tax Titles, Secs. 260, 401; *Cornelius v. Ferguson*, 16 S. D., 113; *Smith v. Williams, &c., Co. (Mo.)*, 73 S. W., 315; *Manker v. Peck (Kan.)*, 81 Pac., 171.) (c) A sale for more than the taxes due. (Black Tax Titles, Secs. 230, 232; *Baker v. Kaiser*, 126 Fed., 317; *Pinkerton v. Land Co. (Wis.)*, 95 N. W., 1089; *Green v. McGraw (Ind.)*, 72 N. E., 1049; *Younglove v. Hackman*, 43 O. St., 69; *Wills v. Austin*, 53 Cal., 152; *Riverside Co. v. Howell*, 113 Ill., 256; *Gage v. Pumpelly*, 115 U. S. 454.) (d) Acknowledgment before a notary public instead of the clerk of the district court was a plain violation of law, and rendered the instrument void. (R. S. 1887, Sec. 3832; *Grattan v. Land Co. (Mo.)*, 87 S. W., 37; *Green v. McGraw (Ind.)*, 72 N. E., 1049; *State v. Harman (W. Va.)*, 50 S. E., 828; *Leftwich v. Richmond (Va.)*, 40 S. E., 651; *Essex v. Meyers*, 62 N. E., 96; *Salmer v. Lathrop*, 10 S. D., 216, 225-6; *Gue v. Jones*, 25 Neb., 634; *Reed v. Merriam*, 15 Neb., 323; Black Tax Titles, Sec. 393; 27 Ency. L. (2d Ed.), 964)

The special statute of limitations (R. S. 1899, Sec. 1861) runs only upon a sale regularly made under the forms of law, and from the time of the deed, rather than the previous sale. But, whether running from the deed or sale is immaterial, since the deed being void on its face the statute was not set in motion. (Black Tax Titles, Sec. 497-8; 127 Ency. L. (2d Ed.), 988; *Dickinson v. Imp. Co.*, 92 S. W., 21; *Martin v. Barbour*, 140 U. S., 634; *Gomer v. Chaffee*, 6 Colo., 314; *Brinker v. Ry. Co.*, 11 Colo. App., 166; *Bird v. Benlisa*, 142 U. S., 664; *Krans v. Montgomery*, 114 Ind., 103; *Gibson v. Kueffer (Kan.)*, 77 Pac., 282; *Marshall v. McDaniel*, 75 Ky., 378; *Welsch v. Augusti*, 52 La. Ann., 1949; *Pennington v. Jones*, id., 2025; *Scott v. Perry*, 32 So., 188; *George v. Cole*, 33 So., 784; *Mellandon v. Gallagher*, 29 So., 307; *Housen v. Manberret*, 28 So., 167; *Rohlman v. Glandi*, 27 So., 116; *Leseigneur v. Bessan*, 26

So., 865, 872; Williams v. Oleson, 141 Mich., 580; Pearce v. Perkins, 70 Miss., 276; Zingerling v. Henderson, 18 So., 432; Smith v. Cooperage Co., 73 S. W., 315; Zink v. McManus, 121 N. Y., 259; Roberts v. Bank, 8 N. D., 264; Sweigle v. Gates, 84 N. W., 481; Lee v. Crawford, 88 N. W., 97; Lewis v. Blackburn, 69 Pac., 1024; Turner v. Hand Co., 11 S. D., 348; Stokes v. Allen, 15 S. D., 421; Salmer v. Lathrop, 10 S. D., 216; Horswill v. Farnham, 16 S. D., 414; Moran v. Thomas, 104 N. W., 212; Jackson v. Bailey, 104 N. W., 268.)

M. Nichols, for defendant in error.

The special six-year statute of limitations (R. S. 1899, Sec. 1861) runs from date of sale. (Mitchell v. Etter, 22 Ark., 178; Gomer v. Chaffee, 6 Colo., 314; McDongall v. Monlezum, 39 La. Ann., 1005; 27 Ency. L., 986.) It was not necessary that defendant show perfect title in himself, but that he was in possession under a tax sale (Russell v. Lang, 23 So. (La.), 113; Michel v. Stream, 19 So., 2; Kaiser v. Harris, 63 Miss., 590; McLaren v. Moore, 60 Miss., 376; Mayer v. Peebles, 58 Miss., 628; Cogburn v. Hunt, 57 Miss., 861.) Defects in the assessment are immaterial after the running of the statute. (Pratt v. Milwaukee (Wis.), 68 N. W., 392; Knox v. Cleveland, 13 Wis., 245; Oconto Co. v. Jerrard (Wis.), 50 N. W., 591.) Before the plaintiff under any circumstances could oust the defendant he must pay all taxes that have been assessed against the land, or offer to do so. (Black v. Johnson, 64 Pac., 988 (Kan.); Ward v. Huggins, 48 Pac., 240.)

Plaintiff cannot in any event recover rent when he has paid no taxes. One in possession of land under a tax deed need not account for rent until the taxes are paid or tendered. (Ritchie v. Will, 58 Pac., 118 (Kan.); Uhl v. Small, 39 Pac., 178 (Kan.); Lewis v. Knowlton, 86 N. W., 875; 85 N. W., 848 (Minn.)

As a rule an acknowledgment is no part of the deed, and a deed is good as between the parties if not acknowledged

at all. And in this case plaintiff is too late to complain. The deed is sufficient upon its face to entitle the defendant to the protection of the special statute of limitation. If the plaintiff was seeking to recover in a court of equity he would be barred on account of his laches, and in law he is barred by the statute. He bought simply for speculation and is not entitled to recover as an innocent purchaser. There is a legal as well as a moral obligation upon the owner of lands to pay taxes regardless of an assessment. (*Couts v. Cornell* (Cal.), 82 Pac., 194.)

BEARD, JUSTICE.

The plaintiff in error, who was plaintiff below, brought this action against the defendant in error, who was defendant below, to recover possession of certain real estate and damages for the alleged wrongful detention of the same by the defendant. The petition is in the usual form for an action in ejectment. The defendant's answer consists first of a general denial, and, second, claiming to hold the land and to be entitled to possession thereof by virtue of a tax deed and tax sale. The sale of the land for taxes is alleged to have occurred January 3, 1891, for the taxes of 1890, and the tax deed under which defendant claims is alleged to have been executed March 19, 1893.

It is alleged in the answer that the defendant and those under whom he claims have been in actual possession of the land for more than ten years; and he pleads both the general and special statutes of limitations. The plaintiff replied denying the new matter set up in the answer, and alleged that the tax sale and tax deed under which defendant claimed were void.

Upon trial in the district court, without a jury, the court found as to the north half of the southeast quarter of section 13, in township 54 north, of range 62 west; and lot 3 of section 18, in township 54 north, of range 61 west of the 6th principal meridian (which is the only land in controversy on this appeal), that "the plaintiff is barred from

recovering the same by the six years' statute of limitations (Sec. 1861, Rev. Stat. 1899) and by defendant's occupancy of the same for more than six years prior to the beginning of this action claiming under a sale thereof for nonpayment of taxes." Judgment was entered accordingly and the plaintiff brings the case here on error.

The only question presented to this court (aside from the sufficiency of the pleading of the statute, which we deem it unnecessary to consider) is the effect of the six years' statute of limitations as contained in Section 1861, R. S. 1899, as applied to the facts in this case. That section reads as follows: "No action for the recovery of real property, sold for nonpayment of taxes, shall be maintained unless the same be brought within six years after the date of sale for taxes aforesaid." No attack is here made upon plaintiff's title or his right to the possession of the land in controversy except the claim of the defendant by virtue of the tax sale and deed pleaded in his answer. The action was commenced more than six years after the date of the alleged tax sale and deed, and we think the court was warranted in finding that the defendant had been in the actual possession of the land for more than six years before this action was commenced. To prove title in himself and to support his possession, defendant offered in evidence a certain instrument purporting to be a tax deed issued by the treasurer of Crook County, in which county the land is situated. The plaintiff objected to the introduction of this instrument for the reason, among others, that it was void upon its face because not acknowledged before the clerk of the district court as required by law. The objection was overruled and the instrument admitted in evidence, and that ruling is assigned as error. The instrument is in form a tax deed, purports on its face to be signed by the treasurer of the county and is acknowledged before a notary public.

The statute in force at the time, in relation to tax deeds, is as follows: "Deeds executed by the treasurer shall be substantially in the following form:" (Then follows the

form.) "Which deed shall be acknowledged by the treasurer before the clerk of the district court, as follows:" (Then follows the form of acknowledgment.) (Sec. 3832, R. S. 1887; Sec. 1896, R. S. 1899.) Where the statute directs the execution of a deed by a public officer and requires it to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging of the deed in that manner is a part of its execution, and without such witnessing or acknowledgment is void upon its face. The rule is stated in Black on Tax Titles, Section 208, as follows: "A rule of primary importance is, that the execution of a tax deed must conform strictly to the statute; that is, any directions which the law may give in regard to its signature, seal, witnesses, or acknowledgment must be duly complied with, or the conveyance will be invalidated. Thus, if the act requires that tax deeds shall be authenticated by the addition of the seal of the county, and this be omitted, the deed will be void; nor will it even be admissible to show color of title under the special limitation of the revenue act."

It was held in *Reed v. Merriam*, 15 Neb., 323, that, "whatever may have been the object of the legislature in requiring the treasurer to attest the execution of a tax deed by his seal, the provision is one that cannot be dispensed with, and the want of a seal is no valid excuse. A treasurer acts under a naked statutory power in executing a tax deed, and unless he comply with the provisions of the statute the deed will be void." Also so held in *Gue v. Jones*, 25 Neb., 634. In *Gabe v. Root*, 93 Ind., 256, the court said: "The appellant, in support of his title, read in evidence a tax deed executed to him by the auditor of said county for said land, and as there was no evidence to impeach the validity of such title, he insists that he was entitled to recover upon the evidence. Section 211 of the act of March 29th, 1881 (Acts 1881, p. 679), provides that "Such deed shall be *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of

the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee simple in the grantor of said deed.' Under this section, appellant insists that as such deed is *prima facie* evidence of a valid title in fee simple it entitled him to recover in the absence of impeaching evidence. If the provisions of said section are applicable to a sale made previous to its adoption, a question we need not determine, this particular deed did not make a *prima facie* case for appellant. The same section provides that 'such conveyance shall be executed by the county auditor, under his hand and seal, witnessed by the county treasurer, and acknowledged before the county recorder or any officer authorized to take acknowledgments, and the same shall be recorded in the recorder's office before delivery.' This deed was not witnessed by the treasurer, and was not executed in compliance with, but in violation of the statute. Such deed was not, therefore, presumptive evidence of a legal title. *Sheehy v. Hinds*, 27 Minn., 259; *Sutton v. Stone*, 4 Neb., 319." (*Armstrong v. Hufty*, 156 Ind., 606-629.)

In Iowa, where the statute required a tax deed to be acknowledged before some one authorized to take acknowledgments, it is held in *Goodykoontz v. Olsen*, 54 Ia., 175, that "A tax deed conveys nothing unless acknowledged." In Pennsylvania the statute required a tax deed to be acknowledged in open court, and it was held a deed not so acknowledged was invalid. (*Lee, Receiver, v. Newland*, 164 Pa. St., 360.) The reason there given being that "the acknowledgment is something more than the mere authentication of the treasurer's signature; it is a judicial act, the completion of the process by which the land of a citizen is taken for his debt to the public." In *Tilson v. Thompson*, 10 Pick. (Mass.), 359, it is held that no title can be claimed under a deed from a collector of taxes unless the deed has been acknowledged and recorded. The case of *Dunlap v. Henry*, 76 Mo., 106, was a suit in ejectment and very much like the present case, and the court there said: "The court ruled properly that the

tax deeds offered by defendant were not sufficient to convey title to the land in dispute. The law in force at the time they were made required such deeds to be acknowledged before the county clerk. (Gen. St. 1865, p. 129, Sec. 124.) The law in this respect was not complied with and the deeds were void." (Citing *Ryan v. Carr*, 46 Mo., 483, and *Williams v. McLanahan*, 67 Mo., 499.) In *Adams v. Buchanan*, 49 Mo., 64, it was held that a sheriff's deed without the clerk's certificate of acknowledgment endorsed thereon was radically defective upon its face; that the acknowledgment is an essential part of the instrument, and that it was error to receive it in evidence without such acknowledgment.

The deed offered in evidence in the case before us not being acknowledged before the clerk of the district court as required by the statute is void upon its face and was inadmissible for the purpose of proving title in the defendant or his right to the possession of the premises. It is no more a valid tax deed than it would have been if not signed by the treasurer. A failure to observe this essential requirement of the statute as to its execution is as fatal to its validity as the failure to comply with the statute as to signature. Both are necessary to constitute the instrument a valid tax deed upon its face.

The question then is, does possession under a tax deed, void upon its face, start the running of the six years' statute of limitations? We are of the opinion that this question must be answered in the negative. There is some apparent conflict in the decisions, but we think the great weight of authority and the better reasoning is in favor of the conclusion we have reached. It is said in *Black on Tax Titles*, Sec. 283: "The provisions of a statute of limitations, to the effect that an action for the recovery of real property sold for taxes can only be commenced within a certain number of years from the date of the deed, will not run in favor of a tax deed that is *void* upon its face, even when the land intended to be conveyed by the tax deed has been in the actual, open and notorious possession of the holder

of the void deed during the whole of the statutory period." The case of *Redfield v. Parks*, 132 U. S., 239, is a leading case upon the question. In that case the trial court found that the tax deed was void, but held that it constituted a claim and color of title sufficient to put in motion the short statute of limitations in favor of any person in possession under it. But the supreme court in the opinion said: "We think it very clear that the judge was correct in holding this tax deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. But we think that the court erred in holding that such an instrument could create color of title which would bring the case within the foregoing statute of limitations." The court in the opinion in that case quotes from *Moore v. Brown*, 11 How., 414; *Trustees of Kentucky Seminary v. Payne*, 3 T. B. Mon. (Ky. Apps.), 161; *Waterson v. Devoe*, 18 Kan., 223; and cites *Mason v. Crowder*, 85 Mo., 526; *Sheehy v. Hinds*, 27 Minn., 259; *Cutler v. Hurlbut*, 29 Wis., 152; *Gomer v. Chaffee*, 6 Colo., 314, and *Wofford v. McKinna*, 23 Tex., 36; and then concludes as follows: "We do not discover in the statutes of Arkansas, nor the decisions of its courts, cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void." To the same effect, see *Hager v. DeGroat*, 3 N. Dak., 354; *Salmar v. Lathrop*, 10 S. Dak., 216; *Schleisher, Admr., v. Gatlin*, 85 Tex., 270; *Brinker v. The U. P., D. & G. Ry. Co.*, 11 Colo. Apps., 166; *Coulter v. Stafford*, 56 Fed., 564; *Keller v. Hawk (Okla.)*, 91 Pac. (Advance Sheets), 778, and 27 Ency. Law (2d Ed.), 988.

There is no statute in this state making a tax deed, although regular and valid on its face, *prima facie* evidence of any fact recited therein or of the regularity of the prior

proceedings. Whether possession under a tax deed valid on its face, without proof of a substantial compliance with the statute as to such essentials as assessment, levy of taxes, advertisement, an actual sale, etc., would set the statute in motion is not presented by the record in the present case, and that question, therefore, is not considered.

Our conclusions are, that the instrument under which defendant claims is void upon its face and was inadmissible for the purpose of proving title or right of possession in the defendant, or that the land had been sold for non-payment of taxes; that defendant's possession under a tax deed, void upon its face, did not set in motion the special statute of limitations contained in Section 1861, R. S. 1899; and that plaintiff's action was not barred by that statute. For the error of the district court in holding that plaintiff could not maintain the action by reason of that statute, the judgment of the district court is reversed and the case remanded to that court for further proceeding not inconsistent with the views herein expressed. *Reversed.*

POTTER, C. J., and SCOTT, J., concur.

SMALL v. JOHNSON COUNTY SAVINGS BANK.

APPEAL AND ERROR—BRIEFS—DELAY IN FILING—INSUFFICIENT EXCUSE—DISMISSAL.

1. That counsel for plaintiff in error, who had completed his brief two days before the expiration of the time for filing and serving same, was unable to find opposing counsel at their office to serve them with a copy until the last day is not a sufficient excuse to avoid dismissal under the rule for a failure to file the brief within the prescribed time.
2. The failure of plaintiff in error to either file or serve his brief within the time required by the rules is a ground for dismissal upon motion of defendant in error. (Rule 21.)

[Decided November 12, 1907.]

(92 Pac., 289.)

ERROR to the District Court, Sheridan County, HON. CARROLL H. PARMELEE, Judge.

Heard on motion to dismiss for failure of plaintiff in error to file his brief within the time prescribed by the rules of court.

M. B. Camplin, for plaintiff in error, argued and contended that the defendant in error is not prejudiced by the failure to file the brief in time, since its counsel was served with a copy within the prescribed period; and that the rule provides for dismissal on this ground only where there is a failure to both file and serve brief. That no inconvenience or prejudice to the opposing party appearing, the delay should not cause a dismissal. (Citing 3 Ency. Pl. & Pr., 710-11, 731; 18 id., 1262-67; Const., Art. V, Sec. 18; *Kennedy v. Kennedy*, 18 N. J. L., 51; *Logan v. Richards*, 14 Mont., 334; *Steele v. Haynes*, 20 Neb., 316; *Dyer v. Dement*, 37 Tex., 431; *Fowler v. Strawberry Hill*, 74 Ia., 644; *Cox v. Forest City*, 66 Ia., 289; *Kellam v. McAlpine*, 63 Ia., 521; *Barbour v. Flick* (Cal.), 53 Pac., 927; *Farleigh v. Kelly* (Mont.), 62 Pac., 495; 33 Pac., 537 (Ore.); 26 Pac., 755 (Wash.); *Peak v. Howald*, 30 Kan., 27; *Hadley v. Hill*, 73 Ind., 442; *Wagner v. Portland*, 60 Pac., 985; *Ry. Co. v. Illig*, 20 Mo. App., 327; *Conklin v. Cameron*, 3 Okla., 525; *Clark v. Mfg. Co.*, 8 S. C., 22; *Shanks v. Carroll*, 50 Tex., 17; *Livesly v. Pier*, 9 Wash., 658; *Ry. Co. v. Cole*, 26 Pac., 535; *Benn v. Chehalis Co.*, 10 Wash., 294; *Water Works v. Peralta*, 42 Pac., 239; *Loan Co. v. Tascott*, 28 N. E., 801 (Ill.); *Neppach v. Jones*, 28 Ore., 286; *Bank v. McKinney*, 1 S. D., 78; *Owens v. Going*, 22 Pac., 768; *Smith v. Wingard*, 13 Pac., 903; *Esterby v. Napa*, 8 Pac., 600; *Roomine v. Cralle*, 27 Pac., 20; *Giachetta v. Marguam*, 33 Pac., 537; *Gustin v. Jose*, 38 Pac., 1008; *Bank v. Griggitts*, 50 Pac., 591; *Carly v. Case*, 38 Pac., 880; 65 Pac., 793; *Gay v. Mayor*, 67 Pac., 88; *Raymond v. Bales*, id., 279; *Moynahan v. Perkins* (Colo.), 68 Pac., 1062; *Johnson v. Pack Co.* (Wash.), 70 Pac.,

254; Chapin v. City, 72 Pac., 117; Wood v. Fisk (Ore.), 77 Pac., 128; Lumber Co. v. Cole, 26 Pac., 555; 70 Pac., 214.)

Burgess & Kutcher, for defendant in error, contended for dismissal, citing: Cronkhite v. Bothwell, 3 Wyo., 739; Bank v. Anderson, 6 Wyo., 518; Robertson v. Shorow, 10 Wyo., 368; Sheehan v. Ditch Co., 12 Wyo., 176; Cook v. Bank, 13 Wyo., 187.

BEARD, JUSTICE.

The defendant in error has filed a motion to dismiss the proceedings in error for the reason that plaintiff in error has failed to comply with rule 15 of this court relative to the time of filing briefs.

That rule provides that within sixty days after filing his petition in error, the plaintiff in error shall file with the clerk four copies of his brief, and shall also within that period serve upon or mail to the opposite party, or his attorney of record, one other copy of such brief. By rule 20 it is provided that by consent of parties, or for good cause shown before the expiration of the time allowed, the court or a justice thereof in vacation may extend the time for filing briefs. And by rule 21 it is provided that when the plaintiff in error or party holding the affirmative has failed to file and serve his brief as required by these rules, the defendant in error or party holding the negative may have the cause dismissed, or may submit it, with or without oral argument.

The petition in error in this case was filed May 31, 1907, and on August 1, 1907, plaintiff in error filed a brief. This brief, under the rule, should have been filed not later than July 30, 1907. The motion to dismiss was filed August 19, 1907. It appears by the affidavit of the attorney for plaintiff in error, filed in resistance of the motion to dismiss, that he completed his brief on July 28, 1907, and on the following day went to the office of the attorneys for defendant in error for the purpose of serving them with

a copy of the same, but did not find either of them in their office. That on the next day, July 30, he again called at the office of said attorneys and served them with a copy of his brief, the receipt of which they acknowledged in writing on one of the copies, which copy and three others were then on the same day, July 30, mailed to the clerk of this court. As stated in the affidavit, and as appears from the record, the four copies of the brief were received and filed by the clerk on August 1, 1907. No application was made to the court or to a justice thereof for an extension of time for filing briefs, before the time for filing under the rule had expired or at any time. No excuse is presented why the brief was not completed and filed in time, other than above stated. The rule does not require that service of the brief be made before it is filed. Service can be made after as well as before filing, provided it is made in time. These rules have been in existence for a long time and have been published in the volume containing the Revised Statutes of 1899 and in Vol. 10 of the Wyoming Reports, as well as in pamphlet form, and are familiar to the profession. They have also been construed and applied in a number of cases by this court. They have the force of a statute and have been held to be binding upon the court, counsel and parties. (Cronkhite v. Bothwell, 3 Wyo., 739; Robertson v. Shorow & Co., 10 Wyo., 368; Sheehan v. First Macy Ditch Co., 12 Wyo., 176; Cook v. South Omaha National Bank, 13 Wyo., 187.) In each of the above cited cases the proceedings in error were dismissed on motion of the defendant in error for a failure to comply with the rule. The excuses presented in those cases for the failure to comply with the rule were in each case much stronger than those here presented, but were held insufficient. In a recent case in this court a motion by plaintiff in error for an extension of time for filing a brief after the time for so doing had expired was sustained, over the objection of defendant in error, on the ground of unavoidable casualty upon a very strong and clear showing

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that the delay was caused by the serious illness of the sole counsel for plaintiff in error of which the party had no knowledge until after the time had expired. In that case there was no motion to dismiss, and it was held that even in the absence of such a motion, the power of the court to extend the time should be sparingly exercised, and only in extreme cases to prevent an apparent injustice. (Phillips v. Brill, 90 Pac., 443; 15 Wyo., 521.)

It is contended by counsel for plaintiff in error, that as the brief was served upon counsel for defendant in error in time, the rule was substantially complied with and that the filing is solely for the convenience of the court. But we think the rule clearly requires both the serving and filing within the sixty days. A party might serve his brief and then conclude to proceed no further and thus put his opponent to the expense of preparing and filing his brief to no purpose. Under the rule the defendant in error has forty-five days after the expiration of the sixty days, given to the plaintiff in error, within which to serve and file his brief, and the case does not go upon the trial docket for submission on the merits until after that time. If the convenience of the court was the only purpose of the rule, the court would not be inconvenienced by the delay. The remaining contention of counsel for plaintiff in error, that rule 21 applies only where there is both a failure to serve *and* file the brief, cannot be sustained by any reasonable construction of these rules. Rule 15 requires both, and a failure to comply with that rule entitles the defendant in error on his motion to a dismissal.

The motion of the defendant in error to dismiss the proceedings in error will be sustained and the proceedings in error dismissed.

Dismissed.

POTTER, C. J., and SCOTT, J., concur.

PORTER V. STATE.

INJUNCTION—CONTEMPT—PRACTICE—PARTIES—APPEARANCE—FINAL ORDER—APPEAL AND ERROR—COSTS IN CONTEMPT—IMPRISONMENT FOR NON-PAYMENT.

1. The statute making the disobedience of an injunction a contempt is both remedial and punitive, since it not only authorizes the requirement of restitution to the injured party and further security for obedience to the injunction, but the imposition of a fine for the use of the county.
2. Without deciding that a proceeding against an injunction defendant as for a contempt in disobeying the injunction may not properly be brought and entitled on the relation of a party or in the name of the state, it is deemed better practice to entitle it in the cause out of which it arises.
3. By voluntarily appearing, filing an answer, and submitting to a hearing without objecting to jurisdiction, upon a rule to show cause why he should not be punished as for contempt for an alleged disobedience of the injunction, an injunction defendant waives the irregularity, if any, in bringing and entitling the contempt proceeding in the name of the state as plaintiff.
4. After such appearance it is too late for the defendant to object for the first time in the appellate court on error that the contempt proceeding was improperly brought and entitled in the name of the state.
5. An order in a proceeding to punish an injunction defendant as for a contempt for an alleged disobedience of a temporary restraining order, which adjudges him guilty and imposes a penalty, is a final order in a special proceeding, and as such subject to review on error.
6. Plaintiff and defendant being adjoining land owners, the latter claimed some of his premises had been included within the former's enclosure, in which he was sustained by a survey of the county surveyor made to establish the line, on his application, pursuant to statute. By temporary restraining order the defendant was enjoined from entering upon plaintiff's premises described only by legal subdivisions without mention of an enclosure. In a proceeding to punish him as for contempt for disobeying the injunction it was not shown that he had gone upon any of the land described in plaintiff's petition or restraining order, but merely that he had entered plaintiff's enclosure. *Held*, that upon the evidence the defendant was not guilty of contempt.

7. A defendant adjudged guilty of contempt for disobedience of an injunction cannot be imprisoned for non-payment of the costs of the contempt proceedings, in the absence of a statute expressly authorizing it.
8. The statute merely authorizing a commitment to custody for the non-payment of a fine imposed in a contempt proceeding for the disobedience of an injunction, there is no authority to imprison for the non-payment of the costs of such proceeding.

[Decided November 25, 1907.]

(92 Pac., 385.)

ERROR to the District court, Uinta County, HON. DAVID H. CRAIG, Judge.

Proceeding to punish as for contempt the disobedience of an injunction. The facts are stated in the opinion.

J. H. Ryckman, for plaintiff in error.

B. M. Ausherman, for defendant in error.

SCOTT, JUSTICE.

For many years prior to March 21, 1905, John W. Stoner was the owner and in possession of the southwest quarter of the northeast quarter, the south half of the northwest quarter of section three (3), and the southeast quarter of the northeast quarter of section four (4), in township 24 north, of range 119 west of the 6th principal meridian, all of said land being situate in Uinta County, Wyoming. The land adjoining and to the south was open and unoccupied government land until July 12, 1904, when Alma Porter, the plaintiff in error, made his desert land entry No. 1401 at the United States land office at Evanston, Wyoming, and which entry embraced the following described land, to-wit: the east half of the southeast quarter of section 4; the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, all in the same township and range. Long prior and at the date of this filing Stoner had constructed and main-

tained a fence on what he claimed to be the boundary line between his land and the adjoining subdivisions south. It was claimed by Porter that the division line between his desert entry and Stoner's land was north of this fence. The dispute as to the line arose from the fact that the quarter post or corner between sections 3 and 4 had been obliterated. On October 4, 1904, Porter applied to the county surveyor of Uinta County to re-establish this corner under the provisions of Section 1188, Revised Statutes of 1899, and to survey and establish the boundary line between his desert claim and Stoner's land. Under the provisions of that section the county surveyor did in October of that year make a survey and re-establish the said quarter corner, and thereafter made an official plat thereof, which is in the record. While constructing ditches, building fences and making improvements upon the land embraced in his desert entry as surveyed by the county surveyor, and on March 21, 1905, Stoner commenced a suit to enjoin Porter from entering upon the land hereinbefore described and owned by him, and such proceedings were had therein that a temporary writ of injunction was allowed and served upon Porter for that purpose. The order, writ and petition therefor described the land by legal subdivisions. Thereafter, upon a petition supported by affidavit, Porter was cited to appear before the district court of Uinta County to show cause, if any, why he should not be punished as for contempt for an alleged disobedience of the temporary injunction. Upon the return day the plaintiff in error appeared and filed his answer, which consisted of a general denial. A hearing was had upon the issues, and upon consideration of the evidence the court found and adjudged him guilty of contempt and imposed a fine, in default of payment of which he was ordered to be confined in the county jail until the fine and costs of the proceeding were paid, or until he should be otherwise discharged by due process of law. A motion for a new trial was made, overruled, and Porter brings the case here on error.

1. The defendant in error has filed a motion to dismiss the proceedings in error upon the alleged ground that the order complained of is not subject to review in this court. It is urged that the contempt proceedings are not properly entitled and that the state is not a party thereto. In *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 474, this court quoted with approval from *People v. Diedrich*, 141 Ill., 665, where it is held that such a proceeding was properly entitled in the original case, though sometimes entitled in the name of the People ex rel., etc. In 9 Cyc., 36, it is said, "No rule as to the proper entitlement of the proceeding is deducible from the authorities. The practice in some jurisdictions is to prosecute a matter of contempt in the cause or proceeding out of which it arose and not as a separate proceeding with a title of its own. The practice in other jurisdictions is to entitle the proceeding in the name of the State or People, or in the name of the State or People at the relation of a party. The logical practice would seem to be to give the proceeding the title of the case out of which the alleged contempt arose, if the object is to compel performance of an act as a remedy for a party; but if the object is punishment alone the proceeding should be in the name of the State." Many cases are cited in the foot notes in support of the text. Our statute authorizes the imposition of a fine, no part of which goes to the party complaining, and the proceeding may, as it did in this case, result in a fine only of the contemnor. While the statute is remedial, it is also punitive, but we are not prepared to say that it may not, in the absence of any statute as to how such a proceeding should be entitled, be brought on the relation of a party or in the name of the State; but preferably we think it should be entitled in the cause or proceeding out of which it arose. The record shows that the order or judgment appealed from is the one rendered in the case of *The State of Wyoming, Plaintiff, v. Alma Porter, Defendant*. The question sought to be raised here is not by way of review, for the record fails to show that that

question was presented to the court below, and it is, therefore, presented here for the first time. This in our judgment is too late, for the contemnor voluntarily appeared in person and by attorney in that court, and without objection to the jurisdiction of the court filed his answer to the rule to show cause. He thereby admitted himself to be regularly in court, and all questions of irregularity in process or method of obtaining jurisdiction became immaterial. It was so held by this court in *Ex parte Bergman*, 3 Wyo., 393.

The proceedings in the lower court were under the provisions of Section 4048, Revised Statutes of 1899. That section is as follows: "An injunction or restraining order granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished by the court, or any judge who might have granted it in vacation, as a contempt; an attachment may be issued by the court or judge upon being satisfied by affidavit of the breach of the injunction or restraining order, against the party guilty of the same; and such party may be required by the court or judge to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and to give further security to obey the injunction or restraining order, and in default thereof, he may be committed to close custody until he complies with such requirement, or is otherwise legally discharged." An order or judgment of conviction under this section may have a double aspect. First, it may be in the nature of a remedy to the party injured by way of compelling restitution and security against a continuance or recurrence of the act complained of; second, it may be punitive or a punishment of the offense of contempt. The statute provides for both, and the form of the judgment would depend upon the circumstances of the case. In the first aspect it is only for the private benefit of the party injured, and in the second the imposing of the fine not only vindicates and asserts the authority of the court, but in addition serves to deter the

defendant from continued or further disobedience of the court's order and, therefore, is an aid to the remedy sought by the plaintiff in the main suit. The section was held to be remedial in *Laramie National Bank v. Steinhoff*, *supra*, where this court said: "The statute is clearly remedial in character, and the order made in a contempt proceeding authorized by its provisions is one which affects a substantial right * * *." It was there further held that when such order was made after judgment or decree and in aid thereof upon a summary application it was made in a special proceeding within the provisions of Section 4247, Revised Statutes of 1899, and subject to be reversed, vacated or modified by this court (Sec. 4249, R. S. 1899) for errors appearing upon the record. We think that when an order is so made before final judgment in aid of and to compel obedience to the temporary writ of injunction that it was equally final and also made in a special proceeding. Section 4247 is as follows: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter." Section 4249 is as follows: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record." Our statute thus recognizes though it nowhere defines what constitutes a special proceeding. The supreme court of Wisconsin said in *Ernst v. The Steamer Brooklyn*, 24 Wis., 616, that "It may not be easy in all cases to determine what is a special proceeding. But many proceedings will be recognized as such; as proceedings for contempt, to obtain discovery of books, etc.; proceedings supplementary to execution and many others." This statement is quoted with approval in a later opinion of that court. (*Witter v. Lyon et al.*, 34 Wis., 564.) The order here

complained of affected a substantial right and was a final determination of the contempt proceedings. (*Laramie Nat. Bank v. Steinhoff, supra.*) Such order could have no effect or bearing upon the final judgment or decree. It in no manner affected or involved the merits, nor did it determine any question for or against either party to the injunction suit. It was not, therefore, a final order affecting a substantial right made in the action. The statute recognizes such an order when made in the action or in a special proceeding and no other. We are of the opinion that the order complained of was final, affected a substantial right, and that it was made in a special proceeding. It may, therefore, be revived by this court on error.

2. The plaintiff in error assigns as error the overruling of his motion for a new trial. One of the grounds of the motion is that the decision is not sustained by sufficient evidence. We are of the opinion that this contention is correct. The question at issue turned upon the location of the line between the lands of the parties and was as to whether the plaintiff in error had gone upon the land of Stoner, nothing being said in the order as to Stoner's enclosure, and the land described being referred to by legal subdivisions only. The plaintiff in error long prior to the issuance and service of the writ of injunction availed himself of the provisions of Section 1188, Revised Statutes of 1899. That section is as follows: "Whenever the proper location of any monument which marks the corner of any tract or tracts of land shall be in dispute between the owners of the lands of which it is the common monument or boundary, the said monument shall be established in the following manner: The county surveyor of the county in which said corner is located, upon the application of any of the parties in interest, shall immediately give notice in writing to all parties interested in the establishment of said corner, naming a day when he will be upon the ground and make the necessary surveys to establish the said corner, and if such service of written notice cannot

be made upon the owners or agents by reason of non-residence, then in that case such notice shall be published for four consecutive weeks in some newspaper published in the county, or if there be no newspaper published therein, then in some newspaper of general circulation published nearest such county. The proper notice being given as above set forth, the county surveyor shall, upon the day named in said notice, proceed to establish such monument in accordance with the instructions issued by the general land office of the United States government. He shall firmly plant a suitable monument at the point by him so found. Shall accurately take and note courses and distances from said point to one or more prominent objects of a permanent nature, if such there be in the vicinity; shall make a map or plat of the survey so by him made and shall record the same together with a statement of the whole proceedings, including the application, notice and names of the parties in interest in the records of his office. Such monuments established as provided in this section shall be held to be the true and legal monument defining the boundary corners as stated in the record of said survey." The plaintiff in error was entitled to the exercise of this statutory right, and having done so in good faith for the purpose of ascertaining the boundary of his land and such boundary having been so established he had a right, in the absence of any injunction restraining him from so doing, to enter and make such improvements thereon within the boundaries so fixed as he deemed advisable. It will be observed that the plaintiff in error was not restrained from entering Stoner's enclosure, but from entering upon certain legal subdivisions as fixed and designated by the government survey. The testimony on behalf of Stoner, the complainant, went only to show that the plaintiff in error had entered upon some of the land enclosed by Stoner's fence, assuming apparently that the right to go inside the enclosure was in issue and that the right of Stoner to the exclusive possession of the land in the enclosure was pro-

tected by the injunction. But the writ only ordered the defendant, his servants, etc., "to absolutely desist and refrain from entering upon the land and premises or any part thereof described in said petition, said land being described as follows, to-wit: The southwest quarter of the northeast quarter, and the south half of the northwest quarter of section three; and the southeast quarter of the northeast quarter of section four, township 24 north, range 119 west of the 6th principal meridian, and from digging post holes thereon and from committing any of the acts complained of in plaintiff's petition." Not only is the evidence insufficient to sustain the decision, but there is an affirmative showing that the defendant was not guilty of disobedience of the order of injunction.

3. Plaintiff in error urges that the judgment is contrary to law. It will be observed from the language of Section 4048, Revised Statutes, *supra*, that the jurisdiction of the court to order that the contemnor be confined in the county jail in such cases for non-payment of fine does not authorize the court to so order for non-payment of costs. Such statutes are strictly construed, and while the costs may be taxed against the defendant, yet in the absence of statute expressly authorizing the court to do so the right to imprison for a failure or neglect to pay such costs does not exist. It was so held in *Miller et al. v. The Toledo Grain & Milling Co.*, 21 O. C. C., 332, where a statute identical in terms was construed. We are of the opinion that if upon other grounds the order could be sustained, then it would be the duty of this court to modify it in that respect.

There is no evidence to support the judgment or order, and for that reason the order should be, and it is hereby, reversed, and the proceeding is remanded with directions to the district court of Uinta County to discharge the defendant.

POTTER, C. J., and BEARD, J., concur.

KRAUSE v. MATTHEWS.

APPEAL AND ERROR—BRIEFS—DELAY IN FILING—DISMISSAL.

1. Though the inability of a plaintiff in error to have the record made up, through the neglect of the district court stenographer to transcribe the evidence, might have been good cause for an extension of time for filing brief, it will not excuse several months' delay in filing the same beyond the time prescribed by the rules, without an extension of time or an application therefor.

[Decided November 25, 1907.]

(92 Pac., 388.)

ERROR to the District Court, Crook County, HON. CARROLL H. PARMELEE, Judge.

Heard on motion to dismiss.

M. Nichols, for plaintiff in error.

Metz & Sackett and Van Cise & Grant, for defendant in error.

POTTER, CHIEF JUSTICE.

This cause was brought in this court by petition in error filed July 23, 1906. At the April term, 1907, no briefs appearing on file, an order was entered to show cause why the cause should not be dismissed. Thereafter, April 22, 1907, a written statement of counsel for plaintiff in error was filed in response to said order, to the effect that the failure to file and serve briefs had occurred through the neglect of the district court stenographer to furnish a transcript of the evidence for incorporation in a bill of exceptions. On June 26, 1907, plaintiff in error filed briefs in the office of the clerk, and July 1, 1907, a paper purporting to be a bill of exceptions was also filed. Several other original papers, with the journal entries, had been sent to this court and filed July 31, 1906.

Several objections are urged to the bill of exceptions, but it is not necessary to consider them. The cause must be dismissed for the failure to comply with the rules as to briefs. The inability to obtain the evidence so as to make

up a bill and have it allowed within the period prescribed for filing and serving briefs might have been good cause for an extension of time; and indeed we have extended the time on that ground in other cases, where the party was not in fault. But it does not appear that any application for such an extension was made in this case. Instead of filing the briefs within sixty days after filing the petition in error, as required by the rules, the plaintiff in error permitted eleven months to elapse, without either filing or serving briefs, or applying for an extension of time therefor.

The motion to dismiss will be granted.

BEARD, J., and SCOTT, J., concur.

UNION STOCKYARDS NATIONAL BANK OF SOUTH OMAHA, NEB., v. MAIKA ET AL.

APPEAL AND ERROR—RECORD—PAPERS IN ANOTHER CAUSE—LIMITATION OF ACTIONS—PART PAYMENT—APPLICATION OF PROCEEDS OF MORTGAGE FORECLOSURE.

1. The original papers and transcript of journal entries in another case between the same parties, not appearing to be a part of the record in the case sought to be reviewed, are improperly sent up and will be stricken from the files and returned.
2. Statutes of limitation affect the remedy and not the cause of action, and in that respect, therefore, an action on contract is governed by the law of the forum.
3. When the fact that the action is barred by the statute of limitations appears on the face of the petition, the objection may be raised by demurrer.
4. An involuntary part payment does not have the effect of arresting the running of the statute of limitations upon a demand founded on contract.
5. The running of the statute of limitations upon a note is not arrested by the application thereon, under an order of court on foreclosure, of the proceeds of the sale of the property mortgaged to secure its payment.

[Decided December 7, 1907.]

(92 Pac., 619.)

ERROR to the District Court, Johnson County, HON. CARROLL H. PARMELEE, Judge.

The action was brought in the district court by the Union Stockyards National Bank of South Omaha, Nebraska, against Amil L. Maika and Emma Maika. Judgment was rendered in favor of the defendants, and the plaintiff prosecuted error. The facts are stated in the opinion.

Allen G. Fisher, for plaintiff in error.

The petition states a valid cause of action. It does not appear that defendants were residents of Wyoming prior to January, 1905, when they were served with summons at their residence and it does appear on the petition that prior to that time, at the making of the notes and the time of the order against them, July, 1904, they were residents of Nebraska, hence no statute of limitations ran in their favor.

This was an action begun in December, 1904, upon a foreign judgment given July 23, 1904. No statute of limitations runs against it. Moreover, there was on file in the case at the time an answer sworn to by Amil L. Maika, on February 3, 1905, acknowledging the making of the notes and not denying the giving of the judgment thereon. This was a new acknowledgment in writing, and in this record, of the original cause of action, and it was inequitable to permit a general demurrer to be filed to the petition when this answer stood with plaintiff's demurrer against it. It was an abuse of discretion to take away from the plaintiff the benefit of the acknowledgment of indebtedness.

Judgment by the Nebraska court giving plaintiff leave to sue is a binding judgment that a valid cause of action thereon at that time existed in favor of plaintiff and against defendants, to which full faith and credit should be given. The leave to sue must be obtained from the court which rendered the judgment, and the fact of its having been granted must be set forth in the declaration or complaint. (Wilson v. Tucker, 105 Ia., 55; Bank v. Gaslin, 41 Minn., 352; Bladinger v. Turkowsky, 36 Misc., 822; Van Arsdale

v. King, 33 N. Y. Supp., 858; Ins. Co. v. Gage, 13 N. Y. Supp., 837; Kendall v. Briley, 86 N. C., 56; Warren v. Warren, 84 N. C., 614; Brock v. Kirkpatrick, 60 S. C., 322; Cole v. Mitchell, 77 Wis., 131; McClenahan v. Cotten, 83 N. C., 332; Graham v. Scripture, 26 How. Pr., 501; Watts v. Everett, 47 Ia., 269; Underhill v. Phillips, 51 N. Y. Supp., 801.)

A judgment is not a "specialty" or "contract, agreement or promise in writing," within the meaning of those terms, as used in statutes of limitations; but actions on judgments are commonly limited by statutes specially applicable to them. If the statute is applicable to "judgments" generally, it includes domestic as well as foreign judgments. But such statutes are ordinarily limited to judgments rendered by courts of record, including the probate courts, and to such as are final and capable of enforcement by execution or in the nature of money judgments. (Haupt v. Burton, 21 Mont., 572; Meek v. White, 26 Wash., 491; Bank v. Lucas, 26 Wash., 417; Mooers v. R. Co., 58 Me., 279; Woodman v. Somerset County, 37 Me., 29; Meade v. Bowker, 168 Mass., 234 (46 N. E., 625); Bannegan v. Murphy, 13 Metc., 251; Vincent v. Watson, 40 Pa. St., 306; Wright v. Dunklin, 83 Ala., 317 (3 So., 597); Barnes v. Marin, 23 Ill. App., 68; Walling v. Howell, 34 La. Ann., 1104; Preston v. Christin, 4 La. Ann., 102; Contra: Smith v. Shawhan, 37 La., 533; Schmil v. Schmil, 4 O. C. C., 38 (2 O. C. Dec., 406); Burd v. McGregor, 2 Grant (Pa.), 353; Crim v. Kessing, 89 Cal., 478; Epperson v. Robertson, 91 Tenn., 407.)

The statute begins to run against a judgment from the date of its rendition or entry, provided it is then final and stable and is not stayed or superseded for any cause, and in computing the period of limitations the day on which the judgment was entered is to be excluded. But where an action on a judgment is expressly prohibited or would not be entertained by the courts until after the lapse of a certain time or the occurring of a particular event the statute does

not begin to run until the accrual of a cause of action upon it. When a judgment is rendered, payable in installments, the statute of limitations begins to run from the time fixed for the payment of each installment for the part then payable. (*Niblack v. Goodman*, 67 Ind., 174; *Kimball v. Whitney*, 15 Ind., 280; *David v. Porter*, 51 Ia., 254; *Tyler v. Winslow*, 15 O. St., 364; *Hazzard v. Nottingham, Tapp. (Ohio)*, 160; *Goodin v. McArthur*, 7 Ohio Dec., 611; *Kaufman v. Richardson*, 37 So., 673 (Ala.); *Brearily v. Norris*, 23 Ark., 169; *Hicks v. Brown*, 38 Ark., 469; *Reay v. Heazelton*, 128 Cal., 335; *Mason v. Cronise*, 20 Cal., 211; *Harrier v. Bassford*, 145 Cal., 529; *Root v. Moriarty*, 30 Ind., 85; *King v. Manville*, 29 Ind., 134; *Larned v. Dubuque*, 86 Ia., 166; *Wooster v. Bateman*, 126 Ia., 552; *Davidson v. Simmons*, 11 Bush. (Ky.), 330; *Beckham's Succession*, 16 La. Ann., 352; *Rice's Succession*, 15 La. Ann., 649; *Kemp v. Cornelius*, 14 La. Ann., 301; *Snyder v. Hitchcock*, 94 Mich., 313; *Kannard v. Alston*, 62 Miss., 763; *Snell v. Rue*, 101 N. W., 10 (Neb.); *Matter of Warner*, 56 N. Y. Supp., 802; *Delavan v. Florence*, 9 Abb. Pr., 277; *Dickson v. Crawley*, 112 N. C., 629; *McDonald v. Dickson*, 85 N. C., 248; *Barringer v. Allison*, 78 N. C., 79; *Tyler v. Winslow*, 15 O. St., 364; *Stevens v. Stone*, 94 Tex., 415; *Wilcox v. Austin First Nat. Bank*, 93 Tex., 322; *Bignold v. Carr*, 24 Wash., 413; *Dickson v. Crawley*, 112 N. C., 629; *Guter v. Sain*, 91 N. C., 304; *Braxton v. Wood*, 4 Gratt., 25; *Coe v. Finlayson*, 41 Fla., 169; *Winter v. Tounoir*, 25 La. Ann., 611; *R. Co. v. Whitaker*, 22 La. Ann., 209; *Johnson v. Foran*, 59 Md., 460; *Warner v. Bartle*, 22 Misc., 488; *Herlich v. McDonald*, 104 Cal., 551; *Edwards v. Hellings*, 103 Cal., 204; *Trenouth v. Farrington*, 54 Cal., 273; *Borer v. Chapman*, 119 U. S., 587; *McConnico v. Stallworth*, 43 Ala., 389; *Bank v. Lucas*, 26 Wash., 417; *Thacher v. Lyons*, 70 Vt., 438; *Feeney v. Hinckley*, 134 Cal., 467; *Peoria County v. Gordon*, 82 Ill., 435; *Williams v. Preston*, 3 J. J. Marsh., 600; *Wills v. Gibson*, 7 Pa. St., 154; *Galt v. Todd*, 5 App.

Cas., 350; Warren v. Slade, 23 Mich., 1 (9 Am. Rép., 70); Bank v. Bayles, 45 N. Y. Supp., 305; Cook v. Moore, 95 N. C., 1; Weiser v. McDowell, 93 Ia., 772; Predohl v. O'Sullivan, 50 Neb., 311; De Uprey v. De Uprey, 23 Cal., 352.)

E. E. Enterline and *Alvin Bennett*, for defendants in error.

Counsel for plaintiff in error now contends that the action was brought to recover upon a deficiency judgment and seeks to construe the petition as supporting that kind of an action. The petition contains on its face—"petition upon note"—and two notes are set forth. If the action was sought to be brought upon a deficiency judgment, the necessity of setting forth the notes is not perceived; but the petition is fatally defective whether brought upon the notes or judgment. Construing the pleading liberally, we believe the action was brought to recover the balance due on the two notes, but the petition fails to allege what, if any, ownership the plaintiff had in the notes. It is alleged specifically in the petition that leave was given to the plaintiff to sue upon the notes and deficiency upon them. This, in connection with the fact that the notes are set forth, clearly indicates that the pleader is seeking to set forth a cause of action upon the balance claimed to be due upon the notes.

It clearly appears from the petition that the notes are barred by the statute of limitations. (R. S. 1899, Sec. 3454; Cowhick v. Shingle, 5 Wyo., 87.) The application of the mortgage proceeds, if any were made within five years prior to the commencement of the action, does not toll the statute. (Moffitt v. Carr (Neb.), 67 N. W., 151.)

The petition is clearly insufficient to support an action upon a deficiency judgment. (Clapp v. Maxwell (Neb.), 14 N. W., 653; D. P. Co. v. Mervis (Neb.), 4 N. W., 1059; Tolman v. Smith, 85 Cal., 280; Meehan v. Bank, 62 N. W., 490.)

SCOTT, JUSTICE.

This action was commenced in the district court of Johnson County on December 28, 1904, to recover upon an alleged balance claimed to be due from defendants in error to plaintiff in error upon two certain promissory notes. A demurrer was interposed to the petition, and after argument and due consideration the court sustained the demurrer, to which ruling the plaintiff excepted and elected to stand upon its petition. Judgment was rendered against the plaintiff and it brings the case here on error.

1. The defendants in error have filed a motion to strike certain papers from the files as not being a part of the transcript or record in this case. The judgment complained of was rendered in a case docketed as No. 711 in the court below and the original papers and transcript of the journal entries therein have been properly certified and returned to this court. In addition to these the original papers and transcript of journal entries in another case between the same parties and entitled the same, but bearing the docket number 677 in the court below, have been certified and returned by the clerk of that court. As it is the judgment in the former case which is here sought to have reviewed, it is apparent that the files and journal entries in docket No. 677 are improperly here. The motion will be granted and the clerk of this court is directed to return to the clerk of the district court of Johnson County the files and certified journal entries in case No. 677.

2. From the petition it appears that at South Omaha, Nebraska, on August 19, 1898, the defendants in error for value received made, executed and delivered their joint and several promissory note to R. Becker and Degan, whereby they promised to pay \$5,100 one year from date, with interest at the rate of 10 per cent per annum. At the same place on August 30, 1898, they executed to the same payee and on the same terms their joint and several promissory note for the sum of \$4,050. Both of these notes were endorsed to the plaintiff in error. A real estate mortgage was

given by defendants in error to plaintiff in error to secure the payment of these notes, upon real estate owned by them and situated in Dawes County, Nebraska. Thereafter and upon default in the payment of said notes and interest, plaintiff in error instituted suit for foreclosure of said mortgage in the district court of Dawes County, in the State of Nebraska, and such proceedings were had that judgment and decree of foreclosure was entered in that court. The judgment is not set out in *haec verba*, but from the allegations of the petition that court rendered its judgment or decree *in rem*, but no personal judgment for deficiency after applying the proceeds of the mortgaged property on the notes was rendered. The action is for a balance claimed to be due upon the notes after allowance of credit for proceeds of sale of the mortgaged property.

The dates of the notes were August 19th and 30th, 1898, respectively, and as each note was due one year from its date, more than five years had elapsed since the notes became due and the time of the commencement of this action. Statutes of limitation go to the remedy and not to the cause of action, and such being the case an action upon a contract is governed by the *lex fori* or the law of the place where the action is brought. (25 Cyc., 1018, and cases there cited; 33 Cent. Dig., tit. "Limitation of Actions," § 4.) The time within which an action could be maintained upon these notes is fixed by Section 3454, Revised Statutes of 1899. That section is as follows: "Within five years an action upon a specialty or any agreement, contract or promise in writing, and on all foreign claims, judgments or contracts, expressed or implied, contracted or incurred before the debtor becomes a resident of this state, action shall be commenced within two years after the debtor shall have established his residence in this state." It is apparent from the allegations of the petition that these notes were barred by the statutes unless the application of the proceeds of the mortgaged property arrested the running of the statute, and the sufficiency of the petition in that respect may be and

was raised by demurrer. (Cowhick v. Shingle, 5 Wyo., 87; Marks v. Board, 11 Wyo., 488; Col. S. & L. Association v. Clause, 13 Wyo., 166.) Section 3466, Revised Statutes of 1899, is as follows: "When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same, has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

In Cowhick v. Shingle, *supra*, this court held that a partial payment by one or two parties jointly and severally liable upon a promissory note was not sufficient under Section 3466 above quoted to suspend the running of the statute in favor of the other. The question is fully discussed and the authorities are reviewed as to what is sufficient to toll the statute. Mr. Justice Clark, who delivered that opinion, after reviewing many cases, said: "In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but in my judgment there is no distinction in principle between the legal effect of payment made before or after the bar of the statute had attached; in either case the legal effect thereof is to create a new cause of action. * * * Upon the whole case I am of the opinion that the true construction of our statute, Section 2381, Revised Statutes of 1887 (which is identical in language with Section 3466, Revised Statutes of 1899), is that given by the supreme court of Ohio in Kerper v. Wood, 48 O. St., at page 621, viz.: 'A payment, an acknowledgment or promise in writing will not avail to take the case out of the statutory bar unless made by a party to be charged thereby, or an agent authorized for that express purpose.'" (See also Bergman v. Bly, 66 Fed., 40.) In construing a statute of similar import the supreme court of Nebraska, in Whitney v. Chambers, 17 Neb., 90 (22 N. W., 229), held that "the payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will,

under Section 22 of the code, take the residue of the debt out of the statutory limitation, as against such debtor." That court said later in reference to that decision: "This case is sustained by the great weight of authority, and it was decided and rests upon the principle that the sale of the property of the maker of the note by his assignee and his application of the proceeds of such sale towards the payment of the note was not a voluntary payment made on the note by the maker, but was a payment *in invitum*, * * * and by operation of law." (Moffitt v. Carr, 48 Neb., 403; 67 N. W., 151; 58 Am. St. Rep., 696.) In Hughes v. Boone, 19 S. E., the supreme court of North Carolina held: "A partial payment of a judgment made on execution does not interrupt the running of the statute of limitations." In Harper v. Fairley, 53 N. Y., 442, the court said: "A part payment, whether made before or after the debt is barred by the statute, does not revive the contract, unless made by the debtor himself or by someone having authority to make a new promise on his behalf for the residue." In Moffitt v. Carr, *supra*, there was a foreclosure of a trust deed or mortgage under a power of sale contained therein upon land situated in Missouri, and the holder of the note endorsed the amount of the proceeds upon the note and it was held not sufficient to arrest the running of the statute. The authorities uniformly support the rule thus announced, though there is a difference of opinion in the adjudicated cases as to the effect of the application by the creditor of the proceeds of collateral security to the payment of the debt. An examination of those cases shows that where such application has been made pursuant to express authority it was regarded as the act of the maker of the note and thus constituted a part payment within the definition of the statute. That question, however, is not presented and need not be discussed further. The court further said: "Had the mortgage made by Carr conveyed lands in the State of Nebraska; had the mortgage been foreclosed, a judicial sale made of the premises, and the proceeds of such sale

indorsed upon the note in suit—it is quite clear that such indorsement would not have been a part payment on the note, within the meaning of the code, and would not have arrested the running of the statute of limitations.” Wherever the question has arisen in a foreclosure sale under a power contained in the mortgage the courts, with the exception of one case in Missouri, which has since been repudiated, have proceeded upon the theory that the act of the creditor in such case represents no voluntary affirmative act on the part of the debtor from which a promise to pay could be reasonably implied. In support of this rule and as to what constitutes a part payment within the meaning of the statute may be cited the following cases, viz.: Holmquist v. Gilbert (Colo.), 92 Pac., 232; Wolford v. Cook, 71 Minn., 77; Lang v. Gage, 65 N. H., 173 (18 Atl., 795); Gibson v. Lowndes, 28 S. Car., 285; Campbell v. Baldwin, 130 Mass., 199; Moffitt v. Carr, *supra*; Westinghouse Co. v. Boyle, 126 Mich., 677 (86 Am. St. Rep., 570; 86 N. W., 136); Regan v. Williams, 80 Mo. App., 577, overruling Bender v. Markle, 37 Mo. App., 234; 19 A. & E. Ency. of Law (2d Ed.), 328, and Vol. 3 of Supplement, and cases cited in foot notes; 25 Cyc., 1370, and cases there cited; 33 Cent. Dig., tit. “Limitation of Actions,” Sec. 631, and cases there cited. The application of the proceeds of the sale to the payment of the notes was by order of the court, and the most that can be said is that it operated as a payment *pro tanto*. It did not revive the unpaid balance, or arrest the running of the statute, for it was an enforced part payment made pursuant to the order of the court and in accordance with a judgment *in rem*, and in so far as the makers of the notes are concerned was an involuntary payment. (Gibson v. Lowndes, *supra*; Thomas v. Brewer, 55 Ia., 227; Benton v. Holland, 58 Vt., 533 (3 Atl., 332.)) In Lang v. Gage, *supra*, the rule is thus stated: “Part payment alone is merely an acknowledgment of indebtedness *pro tanto*. * * * The efficiency of a payment to avert the effect of the statute of limitations as a bar rests in the

conscious and voluntary act of the debtor explainable only as a recognition and confession of the existing liability. * * * It must appear that the payment was a partial one, and made under such circumstances as to show that the debtor understood that he was liable to pay the residue of the debt, and his willingness to pay it." To the same effect is *Blair v. Lynch*, 105 N. Y., 636. In *Campbell v. Baldwin*, *supra*, the court say: "In the case at bar, the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate and to appropriate the proceeds to the payment of the mortgage debt. But this cannot be fairly construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations." So in the case before us the action of the district court of Dawes County, Nebraska, was limited to an interpretation and adjudication of the rights of the parties under the mortgage, and no jurisdiction existed in the court, and the makers of the note did not create nor was anyone authorized, so far as the petition shows, to create a new liability on their part.

It follows that the order of the district court in sustaining the demurrer to the petition was correct and that the judgment should be affirmed. *Affirmed.*

POTTER, C. J., and BEARD, J., concur.

BROWN ET AL. v. GRADY.

AGENCY—SPECIAL AGENT TO SELL REAL ESTATE—UNAUTHORIZED CONTRACT—VALIDITY—REAL ESTATE—IMPROVEMENTS—OCCUPYING CLAIMANTS—RENTS AND PROFITS.

1. One dealing with a special agent with limited authority is bound to know the extent of the agent's authority.
2. An owner of real estate is not bound by a contract for its sale, not ratified by him, made by a special agent in excess of his limited authority.

3. An agent was authorized to sell land for \$400 cash and four equal payments for the balance, the contract to provide for deed upon payment of second note, taxes and ditch stock being paid, the ditch stock not being sold and all assessments worked out. The agent's contract, executed in the owner's name, provided for a deed on payment of the first note, and without requiring as a condition the payment of taxes or ditch stock, or working out of assessments. *Held*, that the agent exceeded his authority, and the owner; not having ratified the sale, was not bound.
4. A special agent with limited authority to sell real estate cannot bind the owner by the receipt of money upon a contract which he has no authority to make.
5. The owner's terms of sale of real estate required among other things a first payment of \$400 in money. The agent contracted to sell upon unauthorized terms, and reported to the owner the deposit upon such sale of \$400 in a bank to be paid over to the owner when his title deeds were returned to the bank with a duly executed bond for deed, and his title was found to be good, *Held*, (1) that the money was not paid to or received by the agent for the owner, but was deposited in bank upon certain conditions; (2) that the transaction between the agent and his purchaser amounted only to an offer by the latter to buy on certain terms.
6. A contract of sale made in excess of a special agent's limited authority does not entitle one in possession of real estate thereunder to the benefits of the occupying claimant's act as to compensation for improvements, in a suit by the owner to recover possession.
7. Where, in a suit by a vendee against one wrongfully in possession, the former shows a legal right to possession from the completion of his purchase, he is entitled to recover rents and profits from that time, though it covered a period before he had received his deed.

[Decided December 7, 1907.]

(92 Pac., 622.)

ERROR to the District Court, Big Horn County, Hon. CARROLL H. PARMELEE, Judge.

Action to recover possession of real estate and rents and profits. The facts are stated in the opinion.

Stotts & Blume and *J. P. Arnott*, for plaintiffs in error.

Was the agent's sale valid? A substantial compliance with the instructions, or one which involves no material variation, is sufficient. (*Warvelle on Vendors*, Sec. 210.) There was a substantial compliance in this case. The agent was authorized to receive the first payment. (*Alexander v. Jones*, 64 Ia., 207; *Tiffany Cont.*, 210.) The plaintiffs in error, under the contract, were entitled to immediate possession. (29 *Ency. L.* (2d Ed.), 705; *Corning v. Loomis*, 111 Mich., 23; *Olson v. Minnesota, &c.*, 89 Minn., 280; *Fitch v. Windram*, 184 Mass., 68.) It would, therefore, follow that there was a legal entry on the land on March 1st by the plaintiff in error. Part of the purchase money had been paid; improvements were made after possession taken, and there is, in the eyes of the law, under these circumstances a complete sale, a complete title, so far as third parties are concerned. The deed to the defendant in error was not delivered until April, 1905; Brown had been in possession several months. The bond for deed did not confer any rights on defendant in error, (1) because it was not executed until after the sale to Brown, and (2) the bond was not a conveyance. (*Stewart v. Fowler*, 37 Kan., 677; *Mungesser v. Hart* (Ia.), 98 N. W., 505; *Warvelle on Vendors*, Sec. 129; *Barr v. Mummert* (Neb.), 77 N. W., 676.) Until at least the defendant in error received a deed, she could have protected herself fully under the bond. She did not do so. With knowledge of the rights claimed by Brown, she took the deed. The possession of Brown was constructive notice to her. (23 *Ency. L.*, 498.)

The plaintiff in error is entitled to reimbursement for his improvements. (*Longworth v. Wallington*, 6 O., 10; *Davis v. Powell*, 13 O., 308; *Preston v. Brown*, 35 O. St., 18; *Stewart v. Stewart*, 90 Wis., 516; *Zwietusch v. Watkins*, 61 Wis., 620; *Trip v. Faussett*, 94 Ga., 330; *McPhee v. Guthrie*, 51 Ga., 83; *Nunn v. Burger*, 76 Ga., 705; *Thomas v. Malcom*, 39 Ga., 328; *Mettler v. Craft*, 39 Ill. App., 193; *Glasscock v. Glasscock*, 17 Tex., 480; *Nourse v. Turnham*,

1 Bibb., 62; Smith v. Bell, 91 Ky., 655; Eury v. Merrill, 42 Ill. App., 193; Hawkins v. King, 1 T. B. Mon., 161; Pugh v. Bell, 2 T. B. Mon., 125; Wright v. Wright, 6 Montreal Leg. N., 116; Hentig v. Redden, 41 Pac., 1054 (Kan.); Duke v. Griffith (Utah), 45 Pac., 276; R. S. 1899, Sec. 4111; Shroyer v. Nickell, 55 Mo.; Bacon v. Calender, 6 Mass., 309; Newhall v. Sadler, 17 Mass., 350; Brooks v. Bruyn, 35 Ill., 392; Pende v. Beaky (S. D.), 89 N. W., 655.) Brown went into open and notorious and adverse possession of the premises, as against the defendant in error, and pursuant to his agreement in good faith. The evidence shows that, but it would be presumed, until the contrary is shown, that he acted in good faith. (*Seigneuret v. Fahey*, 27 Minn., 60; *Hilgenburg v. Northup*, 134 Ind., 92; *Fish v. Blasser*, 146 Ind., 186; *Bates v. Prickett*, 5 Ind., 22; *Clay v. Miller*, 2 Litt., 279; *Stark v. Starr*, 1 Sawy., 15; *Petit v. Flint* (Mich.), 78 N. W., 554.) It was error to allow damages to defendant in error for the time preceding her deed.

Clark & Riner and *Charles A. Blake*, for defendant in error. (*John D. Clark*, *T. Blake Kennedy* and *C. A. Artell*, of counsel.)

Among equal equities the first to get legal title will prevail, although at the time of getting title there may be notice of the prior equity (in point of time), so if money has been paid, or notes given, this notice will not protect the other party. Jones, the agent, had no authority to sell, but only power to find a purchaser. (*Grant v. Ede* (Cal.), 24 Pac., 890; *Duffy v. Hobson*, 40 Cal., 240; *Treat v. Decelis*, 41 Cal., 202; *Armstrong v. Lowe* (Cal.), 18 Pac., 758; *Armstrong v. Oakley*, 62 Pac. (Wash.), 499; 23 Ency. L. (2d Ed.), 901; *Hambert v. Gerner* (Cal.), 76 Pac., 53; *Furst v. Tweed* (Ia.), 61 N. W., 857; *Berry v. Tweed* (Ia.), 61 N. W., 858; *Simmons v. Kramer* (Va.), 13 S. E., 902; *Carstens v. McReavy*, 1 Wash., 359.) The burden of proving authority is on the one dealing with an agent.

The agent exceeded what authority he had. He is required to follow specifically his authority. (Veeder v. McMurrar (Ia.), 23 N. W., 285; Jackson v. Badger (Minn.), 26 N. W., 908; Matthews v. Soule (Neb.), 11 N. W., 857; De Sollar v. Hanscome, 158 U. S., 216; Philadelphia Co. v. Hardesty, 75 Pac. (Kan.), 1115; Railroad v. Sherwood (Ia.), 17 N. W., 564; Dayton v. Buford, 18 Minn., 111.)

Statutes allowing compensation for improvements to occupying claimants are to be strictly construed. One must bring himself strictly within the terms of the statute to recover. (22 Cyc., 13; 15 Cyc., 220; McCoy v. Grady, 3 O. St., 463; Van Valkinburg v. Ruby, 68 Tex., 139; Hollingsworth v. Funkhouser, 85 Va., 448; Huebschmann v. McHenry, 29 Wis., 655; Lunquest v. Ten Eyck, 40 Ia., 213; King v. Harrington, 18 Mich., 218; Wheeler v. Merryman, 31 Minn., 372; Winthrop v. Huntington, 3 O., 327; Shroll v. Kliner, 15 O., 153.) The following elements are concurrently necessary to bring a defendant within the terms of the statute: (1) That he hold under one claiming title by deed duly authenticated and recorded. (2) That he claim by deed, devise, descent, contract, bond or agreement. (3) That he claims to own the same. (4) That he has obtained title. (5) That the successful claimant held adversely. (6) That the defendant acted in good faith. These elements are not present in the case of this defendant. (Beardsley, 1 O. St., 118; 1 Ency. L. (2d Ed.), 857-9; Kilburn v. Ritchie, 2 Cal., 145; Osterman v. Baldwin, 6 Wall., 116; Seymour v. Cleveland, 9 S. D., 94; Preston v. Brown, 35 O. St., 18; Kerns v. Dean, 77 Cal., 556; 15 Cyc., 229; 22 id., 16-18; Carter v. Brown, 35 Neb., 670; R'd. v. Hardenbronk, 21 Kan., 440; Holmes v. McGee, 64 Miss., 129; Board v. Dansty, 48 Ark., 183; Taylor v. Foster, 22 O. St., 255; Williamson v. Jones, 43 W. Va., 562; 81 Am. St., note, pp. 164-172.)

No improvements were shown. An improvement is something done which increases the value of the land. The mere expenditure of labor or money is not legally an im-

provement, and it has frequently been held that evidence of the cost of so-called improvements is not only not conclusive, but is actually irrelevant. The sole and only question is, has the value of the land been increased? And the best criterion, according to innumerable decisions, is whether the rental value has been increased by the improvements claimed. The ordinary cultivation of the land is not an improvement. (*Cullop v. Leonard*, 97 Va., 256.) The defendant Brown alone claims to have made improvements. The other defendant made no such claim. They both join in the petition in error, and the assignments of error are joint. The question as to compensation for Brown's improvements is not, therefore, properly raised. (*Milling Co. v. Price*, 4 Wyo., 293; *Hogan v. Peterson*, 8 Wyo., 564; *Gordon v. Little* (Neb.), 59 N. W., 783; *Ry. Co. v. Hubbard* (Ala.), 38 So., 750; *Wells v. Parker* (Ark.), 68 S. W., 602; *Curtis v. Osborne* (Neb.), 89 N. W., 420; *Poska v. Stearns* (Neb.), 84 N. W., 80; *Moseman v. State* (Neb.), 81 N. W., 853; *McIntyre v. R. Co.* (Neb.), 77 N. W., 57; *Anderson v. Hall* (Neb.), 94 N. W., 981; *Storm v. Holmes* (Neb.), 96 N. W., 73; *Johnson v. Winslow* (Ind.), 53 N. E., 388; *King v. Easton* (Ind.), 35 N. E., 181; *Earhart v. Creamery* (Ind.), 47 N. E., 226; *Board of Comm'rs. v. Fraser* (Ind.), 49 N. E., 42; *Leary v. Richcreek* (Ind.), 59 N. E., 35; *Sibert v. Copeland* (Ind.), 44 N. E., 305; *Estep v. Burke*, 19 Ind., 87; *Rudolph v. Brewer* (Ala.), 11 So., 314; *Hillens v. Brinsfield* (Ala.), 21 So., 208; *Markham v. Washburn*, 18 N. Y. Supp., 355; *Miller v. Adamson* (Minn.), 47 N. W., 452; *Brachtendorf v. Kehn*, 72 Ill. App., 228.)

The plaintiff is entitled to rents and profits from the time her right of possession accrued. (15 Cyc., 211; *Anderson v. Rasmussen*, 5 Wyo., 44.) The rule in ejectment applies. (*Fletcher v. Brown* (Neb.), 53 N. W., 577.)

BEARD, JUSTICE.

This action was commenced by the defendant in error against the plaintiffs in error to recover the possession of

certain real estate situated in Big Horn County and for damages for the unlawful detention thereof. She alleged in her petition that she purchased the premises on the 15th day of April, 1905, and ever since that date has been the owner and entitled to the possession of the premises and that the defendants during all of that time have been unlawfully in the possession of the same and have kept her out of possession to her damage in the sum of fifteen hundred dollars. The defendants answered jointly, denying the allegations of the petition, except that they had been during all of the times stated in the petition and were then in possession of the premises; and alleging that on March 1, 1904, the premises were owned by one E. A. Scott and that immediately prior to that date said Scott authorized one Ira E. Jones to sell the premises for the consideration of \$2,200, payable as follows: \$400 cash and the balance of \$1,800 to be divided into four payments due in one, two, three and four years and to bear interest at the rate of ten per cent per annum from date of sale. That on March 1, 1904, Scott, acting by and through his said agent, sold and delivered possession of the premises to the defendant Brown upon the terms above stated, and that Brown paid to said agent the first payment of \$400 in cash. That by the terms of said sale it was agreed that Scott would execute and deliver to Brown a contract covering the terms of said sale, agreeing that, upon payment of the deferred payments, Scott would execute and deliver to Brown a good and sufficient warranty deed conveying the premises to Brown free and clear of all encumbrance. That Scott had failed to execute and deliver said contract, and that Brown was ready and willing to perform his part of the agreement. That between March 1, 1904, and the commencement of this action Brown had made valuable and permanent improvements upon the premises in good faith of the value of \$843.30, for no part of which he had been reimbursed; and that defendant James had no interest in the premises other than as an employee of Brown. The plaintiff replied de-

nying the new matters pleaded in the answer and alleged that on February 23, 1904, Scott and wife executed a bond for a deed to plaintiff, the terms of which she complied with, and on April 15, 1904, received from Scott and wife a deed to the premises as alleged in her petition. The cause was tried to the court without a jury and judgment rendered in favor of plaintiff and against the defendants for the recovery of possession of the premises and \$500 damages, and defendants bring the case here on error.

Three questions have been presented and argued in the briefs of counsel: (1) The authority of the agent, Jones, to bind Scott as he attempted to do; (2) the right of Brown to reimbursement for improvements as an occupying claimant; and (3) the right of Mrs. Grady to rent before receiving a deed to the premises.

To prove the authority of the agent, Jones, the defendants below offered in evidence a letter from Scott to Jones dated February 20, 1904, which is the only evidence of the authority of the agent, and states the terms upon which Scott would sell. The portion of that letter containing the terms and conditions of sale are as follows: "I will sell and take \$400 cash if you cannot do any better, or get more cash and divide into four equal payments on balance. Will contract to the effect that I will make deed to the place as soon as the second note is paid and taxes and ditch stock is kept paid up and none of the ditch stock sold to anyone and all assessments worked out. I would want 10 per cent on all deferred payments in any case." The agreement on which Brown relies in this action is as follows:

"THERMOPOLIS, WYOMING, March 1st, 1904.

"This is to certify that we have this day sold to Marion F. Brown the following real estate, to-wit: (describing it) "for the sum of two thousand two hundred (\$2,200.00) dollars, and that we have this day received the sum of four hundred (\$400.00) dollars as part payment of the purchase price of said real estate. The balance of eighteen hundred (\$1,800.00) dollars to be divided in four (4) equal pay-

ments due in one (1), two (2), three (3) and four (4) years from this date, with interest at the rate of ten (10) per cent per annum, payable annually from this date. A contract is to be entered into providing that upon the payment of the first annual payment of four hundred (\$400.00) dollars and interest that a good and sufficient warranty deed is to be made conveying said real estate to the said Marion F. Brown, at which time the said Marion F. Brown is to execute a mortgage covering the said real estate securing the payment of the three (3) deferred payments.

"E. A. SCOTT and MARY A. SCOTT,

"By IRA E. JONES, their agent."

It is quite apparent that the terms contained in this instrument are not the terms upon which Jones was authorized to sell. It contains no provision for the payment of taxes, keeping the ditch stock paid up or for keeping the assessments worked out by Brown, and provides for a deed from Scott to Brown when the *first* instead of the *second* note is paid—leaving out of consideration the fact that the first annual payment is made by this instrument \$400 instead of \$450. Upon the face of the instrument Scott was required to deed the land upon the payment of \$800 instead of \$1,300, as stated in his letter of February 20. Brown was dealing with a special agent with limited authority and he was bound to know the extent of the agent's authority. This principle is too well settled to require the citation of authorities, but see 1 Enc. Law (2d Ed.), 987. We think the agent clearly exceeded his authority in executing the instrument above set out; and this attempted sale not having been ratified by Scott, was invalid and he was not bound thereby.

Counsel for defendants in error place some reliance upon the payment of the \$400 by Brown to Jones—the court having found "that the defendant Brown paid to the said Ira E. Jones, agent, on said agreement (being defendants' exhibit 2) the sum of \$400.00 at the time of the execution of said contract, on the first day of March, 1904." But this

money never was paid to or received by Scott; and Jones could not bind him by the receipt of money on a contract which he (Jones) had no authority to make. The conditions on which this money was paid to and received by Jones is explained by his letter to Scott, which was admitted in evidence without objection, and the statements therein contained were not denied by Brown. The letter is dated, "First National Bank, Thermopolis, Wyo., March 1st, 1904," and contains the following statement: "The agreement is as follows: The purchase price is \$2,250.00; \$400.00 is now deposited here to be paid to you when you furnish abstract of title or proof that your title is good, which will be determined when you send into this bank all of the papers you have conveying title, and returning the enclosed bond for a deed duly signed and witnessed, you filling in prior to signing the numbers of the land and date of signing. When the papers are returned as requested, and your title found good, the \$400.00 will be paid over and notes executed as per the bond for a deed and forward to you, and on January 1st, 1905, the first note and all accrued interest will be paid and at that time you are to execute a warranty deed and Brown is to secure the remaining three notes with a mortgage deed on the land he gets from you. * * * I trust that my action in this matter is fully satisfactory to you and that you may be able to show that your title is good and that the deal will stand." It is clear, we think, that this money was not paid to or received by Jones as agent for Scott, but was deposited in the bank of which Jones was cashier to be paid only upon the performance by Scott of certain conditions, and that the transaction between Jones and Brown amounted to no more than an offer by Brown to purchase on certain terms, which offer was not accepted by Scott. Brown did not take or hold possession of the premises by virtue of a contract or agreement from and under any person claiming title derived from the public records or otherwise and was not, therefore, entitled to the benefits of the occupying

claimant's act. The possession of the defendants being without authority and wrongful, and the evidence being sufficient to show a legal right to possession in the plaintiff below from and after the completion of her contract of purchase, which was about March 24, 1904, she was entitled to recover the rents and profits of the premises from that date, and we find no error in the judgment of the district court in that respect, no objection being made that the judgment is not supported by the pleadings. The plaintiffs in error having failed to prove the authority of the agent to make the contract under which they took possession, the judgment of the district court was right and accordingly is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

BOSWELL v. FIRST NATIONAL BANK OF
LARAMIE.

PARTNERSHIP—CHATTEL MORTGAGE—POWER OF ATTORNEY TO EXECUTE—ACKNOWLEDGMENT—DISQUALIFYING INTEREST OF OFFICER—STOCKHOLDER OF CORPORATION—RECORDING—CONSTRUCTIVE NOTICE—RENEWAL AFFIDAVIT—EVIDENCE—PROOF OF PRIVATE WRITINGS—SUFFICIENCY OF CERTIFICATE OF ACKNOWLEDGMENT—ATTESTATION OF INSTRUMENT—SUFFICIENCY—REPLEVIN—PETITION—SUFFICIENCY—DEMAND—DIRECTING VERDICT—CONSIDERATION OF PARTNERSHIP MORTGAGE—VERDICT AND JUDGMENT IN REPLEVIN.

1. Under the statute declaring it necessary for each member of a partnership to execute and acknowledge a chattel mortgage of firm property, a partner, if under no legal disability, may, by a duly executed power of attorney, appoint an attorney in fact to act for him and in his name in the execution and acknowledgment of such an instrument; and a co-partner may be so appointed.
2. An officer who is financially or beneficially interested in the transaction is incompetent to take and certify the acknowledgment to an instrument.

(6)

3. The interest of a stockholder in a corporation disqualifies him to take an acknowledgment where the corporation is a party to the instrument.
4. Where the disqualifying interest of the officer taking an acknowledgment does not appear on the face of the instrument or certificate, and a defective acknowledgment would not invalidate the instrument between the parties to it, the recording thereof in the proper office operates as constructive notice to subsequent purchasers and others chargeable with record notice.
5. Where a chattel mortgage, which is valid between the parties thereto even without acknowledgment, appears on its face to have been properly and regularly acknowledged, it is entitled to be filed in the proper office, and the record thereof is notice to subsequent purchasers, notwithstanding that the acknowledgment was taken before a stockholder of the mortgagee, a corporation, that fact not appearing by the instrument or certificate of acknowledgment.
6. The fact that an affidavit in renewal of a chattel mortgage was sworn to by an officer of the mortgagee, a corporation, before a stockholder does not prevent its operation as constructive notice, where it does not disclose on its face the interest of the officer who administered and certified to the oath. (But whether a stockholder would be disqualified to certify to such an affidavit is not decided.)
7. By the strict rule of the common law the primary or best evidence of the execution of a deed or other private writing having a subscribing witness is generally the testimony of such witness, if available, or, if not, proof of his handwriting, if that be feasible; if neither be attainable, it is then competent and sufficient to prove the signature of the grantor or maker.
8. Where an attesting witness to an instrument is not within the jurisdiction of the court, he is to be regarded as unavailable, and proof of that fact lets in secondary evidence of execution.
9. Where the execution and attestation of an instrument occurred out of the jurisdiction, it is to be presumed, in the absence of contrary evidence, that the subscribing witness is out of the jurisdiction at the time of the trial, and that proof of his handwriting is not attainable.
10. Because of the presumption where execution and attestation of an instrument occurred out of the jurisdiction, it is not, in such case, incumbent upon the party offering the

instrument to show diligent and unsuccessful search for proof of the handwriting of the subscribing witness, to let in proof of the maker's signature.

11. Whether evidence is satisfactory respecting the absence of a subscribing witness, so as to let in secondary evidence of the execution of the instrument, is chiefly a question for the trial court, which will not be revised on error if there is any testimony tending to show the fact.
12. The execution by each of two non-resident makers of a power of attorney was attested by a separate witness; the acknowledgment of each was taken out of this state and in the state where he resided; it was testified by a witness that one subscribing witness had resided at the same place as the party whose execution he had attested, and that he supposed the other resided where the party did whose execution was attested. *Held*, that the showing of execution and attestation out of the jurisdiction was sufficient, and there being no evidence to indicate that the attesting witness then or had ever resided in the jurisdiction, the presumption that they were unavailable as well as proof of their handwriting followed, and proof of the signatures of the parties to the instrument became admissible.
13. An objection on the trial that the proof fails to show inability to obtain the testimony of the attesting witness to an offered instrument or proof of their handwriting does not reach the sufficiency of the proof of the genuineness of the maker's signature, so as to entitle an objection on the latter ground to be considered on error.
14. An objection to the form of the attestation by subscribing witnesses to an offered instrument not made on the trial is not entitled to consideration on error.
15. A certificate of acknowledgment to an instrument reciting that the party acknowledged it to be "his free and voluntary act for the uses and purposes therein set forth" is sufficient, without adding the words "and deed" after the word "act."
16. Section 2752, Revised Statutes 1899, declaring the form of acknowledgment therein set out to be sufficient, does not make its use imperative.
17. Under the statute providing that an officer taking an acknowledgment shall indorse upon the instrument a certificate of the acknowledgment thereof and the true date of making the same, a certificate is sufficient stating: "Personally came before me (maker's name), whose name is subscribed to the within instrument, and acknowledged same free and voluntary."

18. Though the statute requires the true date of making an acknowledgment to be stated in the certificate, it is sufficient if the date appears by evidence within the instrument itself.
19. A certificate of acknowledgment is entitled to a liberal construction, and where an omission can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be sufficient.
20. An instrument appearing to have been made and executed July 17, 1891, and acknowledged by one of the makers July 21, 1891, it is proper to presume that the acknowledgment of the other maker was made in the same month and year, which is certified as having occurred "this 29th day of July," as against an objection on the ground of an omission of the date.
21. A power of attorney by non-resident partners to a resident and managing co-partner to execute chattel mortgages on the firm property to secure partnership debts then or thereafter existing, executed in 1891, recorded in 1896, under which a chattel mortgage was first executed in 1898, is not objectionable as a stale instrument or on the ground that its revocation was not negatived by proof; since the time of recording such an instrument is not limited by statute or rule of law, the power granted was a continuing one and not limited to a single transaction, the partnership had continued, and revocation by act of the parties during the continuance of the partnership is not to be presumed.
22. A firm debt represented by an accommodation note of a third party to the firm indorsed and guaranteed by the latter to the mortgagee is properly secured by a chattel mortgage of partnership property; so held in a replevin suit between the mortgagee and a subsequent purchaser of the mortgaged chattels.
23. In Wyoming replevin is not a local action, and the petition, therefore, need not allege a detention of the property in the county where suit is brought.
24. A petition in replevin is not objectionable for alleging the detention to be "wrongful" instead of "illegal." If wrongful, the detention will be illegal or unlawful in the sense in which those words are applied to the detention of chattels from a plaintiff entitled thereto.
25. A mortgagee of chattels may maintain replevin upon default in the conditions of the mortgage, though he has never had actual possession.

26. Where the mortgagor of chattels is permitted by the mortgage to continue in possession until default, or until the mortgagee shall elect to take possession, a demand before suit is usually essential to render the possession of the mortgagor, or one claiming under him subject to the mortgage, wrongful.
27. Where the original taking was not wrongful, a demand is as a rule necessary to put the right of possession in the plaintiff, but demand or proof thereof may be waived by the previous conduct or assertions of a defendant in possession, or his attitude in the suit showing that a demand would not have been complied with.
28. Demand before suit is excused where it appears by the declaration, conduct, or claims of a defendant in replevin that it would not have been complied with.
29. A claim made by a defendant in replevin either by the pleadings or upon the trial inconsistent with the supposition that he would have complied with a previous demand overthrows the presumption that the property would have been delivered upon demand, and renders proof of demand unnecessary.
30. A claim of ownership by a defendant in replevin excuses proof by plaintiff of previous demand.
31. The filing of a chattel mortgage pursuant to statute is a substitute for the transfer of possession; and the filing of a renewal affidavit has the same effect after maturity.
32. Where, as provided by statute, a chattel mortgage is filed, and continued in force by the filing of renewal affidavits, the mortgagee is not required to take possession of the property upon maturity of the mortgage debt, to preserve the priority of the mortgage lien, and protect his rights against a charge of fraud.
33. The "scintilla of evidence rule" is not a safe criterion in determining when a verdict may be directed, since it fails to carefully discriminate between the prerogatives of the court and jury, and requires the submission of evidence which might afford no reasonable justification for a verdict.
34. In determining the propriety of directing a verdict, the rule is to be considered that a question of fact must be passed upon by the jury, and a question of law by the court, and that the credibility of witnesses and weight of conflicting testimony are questions of fact.
35. Where the question upon uncontradicted evidence is one of law as to the right of a party to recover a verdict may be directed.

36. Part of the consideration of a partnership chattel mortgage was money advanced upon the credit and note of the firm, to satisfy the indebtedness of another party represented by one firm note and three smaller notes of one of the partners, and the purchase price of certain cattle, the bill of sale having been dated the day following the execution of the mortgage and made out in the name of said individual partner and handed by the seller to the mortgagee; it appeared by uncontradicted testimony that the said partner's individual notes had been given for money borrowed for and on account of the firm, of which he was the managing and resident partner, and that the cattle were purchased by said partner for the firm, who had possession thereof, before the payment of the price and the execution of the mortgage. It did not appear that the said partner directed or knew the bill of sale to be made out in his name. *Held*, (1) that the money was advanced for partnership indebtedness, and was properly secured by the partnership mortgage. (2) That the cattle aforesaid were properly mortgaged as firm property. (3) The question was one of law upon the undisputed facts whether the mortgage attempted to secure a partner's individual debt instead of a debt of the partnership, and in that respect a verdict was properly directed for the plaintiff mortgagee.
37. Where upon a claim of fraud, the testimony of *bona fides* is undisputed, a verdict is properly directed.
38. A purchaser of chattels from a receiver in proceedings supplementary to execution, on a sale to pay the receiver's expenses, takes subject to prior valid and subsisting liens.
39. Section 4158, Revised Statutes 1899, permitting an action of replevin to proceed as one for damages when the property has not been taken, or has been redelivered to defendant for want of an undertaking by plaintiff, does not apply where the defendant has obtained a redelivery upon his giving the undertaking provided for in Section 4151.
40. The plaintiff's undertaking in replevin, when given, stands in the place of the property to the extent of defendant's interest, and the property passes into the exclusive possession and control of the plaintiff.
41. The statute authorizing a defendant in replevin to regain possession upon giving a redelivery bond being silent as to verdict and judgment when plaintiff recovers in the action, the common law applies.
42. The gist of the action in replevin is the wrongful detention, whether the original taking was lawful or unlawful.

43. Where property taken in replevin has been redelivered to the defendant upon his giving the statutory bond to deliver the property to plaintiff if that be adjudged, and to pay all costs and damages awarded against him, the judgment, when plaintiff recovers, should be in the alternative that he recover the property, or in case a delivery cannot be had, that he recover the value thereof.
44. But where a judgment for a return of the property could not have been complied with because of defendant's sale of the property, or a part thereof, a judgment for plaintiff for the value of the property alone will not be disturbed on error.

[Decided December 7, 1907.]

(92 Pac., 624.)

[Rehearing denied February 10, 1908.]

(93 Pac., 661.)

ERROR to the District Court, Albany County, HON. DAVID H. CRAIG, Judge.

The First National Bank of Laramie, Wyoming, brought an action in replevin against N. K. Boswell. The defendant prosecuted error from a judgment for the plaintiff. The facts are stated in the opinion.

H. V. S. Groesbeck, for plaintiff in error.

The power of attorney to the co-partner to execute chattel mortgages was inadmissible because improperly attested and acknowledged. The reference by initials to the party whose signature was attested is insufficient. A power of attorney must be executed with the formalities required by law. (22 Ency. L. (2d Ed.), 1086.) Though it permits the mortgaging of chattels only, it should be executed in the same manner as is required in case of a power to convey lands. (*State v. Cowhick*, 9 Wyo., 93.) The execution of the instrument was not established by sufficient proof, since there was no proof by the witnesses, nor that they were out of the jurisdiction. Every kind of private writing, except ancient documents, must be proved to have been made by the party whose act it purports to be in order to render it properly admissible in evidence. (4 Ency. Ev.,

829, 831; Greenleaf's Ev., Sec. 575; Wigmore's Ev., Sec. 1320; 2 Ency. L. (2d Ed.), 584.) The certificate of acknowledgment must show that the grantor acknowledged the instrument to be his or her act and deed. (1 Ency. L. (2d Ed.), 541.) This was not done in the case of Julia A. Bird, which renders her acknowledgment absolutely worthless. The acknowledgment of William J. Bird is entirely too informal and irregular to be legal, as it appears that he did not acknowledge it as his act or deed or for the uses and purposes therein set forth, which appears to be necessary. Each and every member of a co-partnership must execute and acknowledge a chattel mortgage for and on behalf of the co-partnership. (Sec. 2808, Rev. Stat.) As this was not done in person, Thomas Bird had no right to execute the chattel mortgages forming the basis of this action for the co-partnership of Bird Brothers, and even if he could do it as proxy or under power of attorney, which is extremely doubtful under the plain wording of our statute, it has not been established that he had the right from the other members of the co-partnership to execute the same for them.

But even if the pretended power of attorney was in evidence rightfully, Thomas Bird had no right, power or authority to mortgage any of the firm property to pay the debts of John Bird, not a member of such firm. His note, which Bird Brothers guaranteed, and which was included in the larger mortgage, was executed as a mere cover to the bank in order to save an open violation of the banking laws. John Bird received no consideration for this note.

The petition is insufficient and will not support a judgment in favor of the plaintiff. This is an inquiry always open in an appellate tribunal and for the first time. (A) The petition does not contain an allegation of venue, and this is necessary. (18 Ency. Pl. & Pr., 504, note 4, and 540.) (B) The petition alleges that the defendant "wrongfully" detains in his possession from the plaintiff the goods and chattels therein described. This is clearly insufficient. The

petition must allege that the defendant "unlawfully" detains the property. (18 Ency. Pl. & Pr., 539.) It is true that the affidavit for the order of delivery or writ of replevin need but state that the defendant "wrongfully" detains the property, but in a judgment for plaintiff the jury must assess adequate damages for the illegal (not wrongful) detention. (Rev. Stat., Sec. 4156.) The affidavit for the order of delivery is no part of the petition and does not form part of the pleadings or the issues in the cause. Merely averring that the defendant wrongfully detains the property is a legal conclusion. (2 Bates Pl. & Pr., 700, and cases cited; 24 Ency. L. (2d Ed.), 494.) (C) There is no allegation or proof that the bank ever had actual possession of the property, although a special ownership is averred. A special owner cannot maintain replevin unless he has had actual possession. A special property is not complete until actual delivery. (2 Nash. Pl. & Pr., 837, and cases cited.) The bank should have sought possession or made proper demand therefor before commencing the action.

Under the general denial, the defendant may show title in himself, and, in cases where plaintiff had not actual prior possession, defendant may disprove or dispute plaintiff's title by showing title in a stranger. (Gallick v. Bordeaux (Mont.), 78 Pac. Rep., 583; Dresser v. Leman (Wis.), 100 N. W., 844; 4 Curr. Law, 1289.) In replevin plaintiff must have a special ownership in the property in controversy, or be its owner. He must be entitled to the immediate possession. Defendant must wrongfully and unlawfully detain the same. Plaintiff must recover on the strength of his own title, and the title must be such as to give him the legal right to possession. (Harding v. Eldridge (Mass.), 71 N. E., 115; Beirman v. Riethorne (N. J.), 58 Am., 1083; Robb v. Dobrinske, 14 Okla., 563.) Defendant is not estopped to deny plaintiff's title even though he pleads title in himself, and waives thereby the technical defense that he was not in possession at the commencement

of the action, and the fact that he admits the execution of the instrument under which plaintiff claims does not preclude him from attacking its validity. (*Culver v. Randle* (Ore.), 78 Pac., 394; *Robb v. Dobrinske*, 14 Okla., 563; 10 N. W., 844; 91 N. Y. Supp., 552; 101 N. W., 61.) A general denial is sufficient to let in any legal defense, such as paramount title in the defendant or in third person. (*Iba v. Central Asso.*, 5 Wyo., 355; *White v. Gemeny*, 47 Kan., 741; *Aultman v. O'Dowd*, 73 Minn., 58; *School Dist. v. Schoemaker*, 5 Neb., 36; *Creighton v. Newton*, 5 Neb., 100; *Richardson v. Steele*, 9 Neb., 483; *Woodworth v. Knowlton*, 22 Cal., 164; *Caldwell v. Bruggerman*, 4 Minn., 270; *Sparks v. Heritage*, 45 Ind., 66; *Bailey v. Bayne*, 20 Kan., 657; *Litchfield v. Hailligan*, 48 Ia., 126; 18 Ency. Pl. & Pr., 549; *Eaton v. Metz* (Cal.), 40 Pac., 947; *Street v. Morgan*, 67 Pac., 448; *Payne v. Mach. Co.*, 66 Pac., 287; *Fuller v. Brownell*, 48 Neb., 145; *Harvey v. Ivory* (Wash.), 77 Pac., 725; *Sommerville v. Milling Co.*, 76 Pac., 243 (Cal.); *Anthony v. Carp*, 90 Mo. App., 387; *Nichols v. Bishop*, 70 Pac., 188; *Elliott v. Bank*, 70 Pac., 421.) A general denial in code pleading admits any general or special matter constituting a defense. (*Bank v. Frink* (Neb.), 92 N. W., 916; *Bayle v. Bayne*, 20 Kan., 657; *White v. Gemeny*, 47 Kan., 741; *Ry. Co. v. Gila Co.* (Ariz.), 79 Pac., 913; *Frunold v. Million*, 74 S. W., 419; *Janson v. Effey*, 10 Ia., 227 (1859); *Shadduck v. Stotts*, 59 Pac., 39; *D'Arcy v. Steuer*, 179 Mass., 40; *Jones v. McQueen*, 13 Utah, 178; *Horkey v. Kendall*, 73 N. W., 953; *Holliday v. McKinne*, 22 Fla., 153; *Holmberg v. Dan*, 21 Kan., 73; *Towne v. Sparks*, 23 Neb., 142; *Cobbey on Replevin*, 413, 785, 786; *Burchinell v. Butters* (Colo. App.), 43 Pac., 459; *Best v. Stuart* (Neb.), 67 N. W., 881; *Conner v. Knott* (S. D.), 66 N. W., 461; *Wester v. Long*, 63 Kan., 876; *Thresher Co. v. Pierce*, 74 Mo. App., 676; *Gibson v. Mozier*, 9 Mo., 256; *Chamberlain v. Same*, 1 Wash., 259; *Timp v. Dockman*, 32 Wis., 146; *Delaney v. Canning*, 52 Wis., 266.)

One who is a stockholder, as well as an officer, of a corporation is disqualified to take the acknowledgment of an instrument to which the corporation is a party, or in which it is financially or beneficially interested. (*Bank v. Bank*, 11 Wyo., 32.) The invalidity of the acknowledgment to the mortgages can be shown under defendant's general denial. If plaintiff be without title defendant may recover though title is not shown in himself. (*Wilkins v. Wilson*, 2 Hardesty, 117.) The plaintiff must have right to possession as well as title. (*Gassell v. Doty*, 73 Ill. App., 406; *Clark v. West*, 23 Mich., 424; *Beldin v. Laing*, 8 Mich., 500; *Collier v. Yearwood*, 5 Baxt., 581; *Cobbey on Replevin*, 785.)

The plea that the mortgages forming the basis of this suit were good as between the parties thereto cannot avail here, as we can show readily that they were void as to creditors; but we were prevented from so showing although it plainly appears and without dispute that the sheriff as receiver had possession of the property at the instance of one of the creditors in existence even before these mortgages were executed.

Proof of demand by plaintiff was necessary. (*Wells on Replevin*, 347; *Rodgers v. Brittain*, 39 Mich., 477; *Caldwell v. Pray*, 41 Mich., 307; 1 *Cobbey on Ch. Mort.*, 453, 482, 737; *Murchalter v. Mitchell*, 27 S. C., 240; *Simmons v. Jenkins*, 76 Ill., 479; *Keller v. Robinson*, 153 Ill., 458; *Kellogg v. Olsen*, 34 Minn., 103; *Black v. Pidgeon*, 70 N. J. L., 802; *Quinn v. Schmidt*, 91 Ill., 84.) A bona fide purchaser of personal property from a wrongful taker is not liable in replevin by the lawful owner without demand first made. (*Conner v. Comstock*, 17 Ind., 90; *Ledbetter v. Embree*, 12 Ind. App., 617; *Kellogg v. Olson*, 34 Minn., 103; *Barrott v. Warren*, 3 Hill, 348; *Millpaugh v. Mitchell*, 8 Barb., 333.) Possession must be taken by a chattel mortgagee within a reasonable time, or he will lose his rights against creditors of the mortgagor with liens attaching subsequently to the default and before mortgagee has taken

possession. (5 Ency. L., 1002 (2d Ed.); *Travis v. McCormick*, 1 Mont., 148; *Cobbey on Ch. Mort.*, 502.) This rule ought to be good in case of an innocent purchaser from a receiver under an order of court.

No title passed to Bird Brothers of the cattle purchased of Crumrine, the purchase price of which formed the bulk of the pretended consideration for the first and larger chattel mortgage, as bill of sale was made to Thomas Bird one day after the execution of the mortgage.

Neither the judgment nor the verdict is sufficient. The jury should have found that the plaintiff was either the owner or entitled to possession at the commencement of the action, and then assessed the damages as are right and proper. (Rev. Stat., 4156, 4158.) The judgment is not such as is contemplated by law, as a judgment merely for the value is improper and illegal. (*Hall v. Trust Soc.* (Wash.), 60 Pac., 643; *Ulrich v. Conaughey*, 63 Neb., 10; *Conklin v. McConley* (N. Y.), 41 App. Div., 452.) The damages assessed were entirely too high, even if plaintiff should recover at all, and it is believed that the verdict of the jury in that regard was not based upon the evidence, but was clearly against the weight of evidence, and that the verdict was caused by the court erroneously taking from the jury every issue in the case except the single one of damages.

N. E. Corthell, for defendant in error.

The power of attorney was sufficiently executed. (*Morris v. Linton*, 61 Neb., 537.) The presumption is that the witnesses to an instrument executed in another state reside there and are beyond the jurisdiction of the trial court. The certificates of acknowledgment to the power of attorney are sufficient. (*Brunswick, &c., Co. v. Brackett*, 37 Minn., 58; *Jackson v. Gilchrist*, 16 Johns., 89; *Imp. Co. v. Carrigan*, 31 N. J. L., 14; *Carpenter v. Dexter*, 8 Wall., 513; 1 Cyc., 581, *et seq.*) The John Bird note was a firm obligation and properly secured as such.

Replevin is a transitory action in this state, so that it is unnecessary to allege the place of detention to support the venue. (R. S., Sec. 3505.) The words "wrongfully" and "unlawfully" are used interchangeably in describing detention in replevin, and either is sufficient in a petition. (Wilhite v. Williams, 41 Kan., 288; Nolan v. Jones, 53 Ia., 357; Adams v. Corrison, 7 Minn., 465; Anderson's L. Dict., 1125; R. S., 4146.) The bank became special owner upon the execution of the mortgage. It became entitled to possession when the condition happened which under the terms of the mortgage gave it that right. Waiving consideration of the question how far, in view of the special defenses pleaded as to the validity of the mortgages, the defendant could avail himself of the objection to the acknowledgments if valid, the evidence offered was immaterial and irrelevant in any event. If there had been no acknowledgment the mortgages would have been valid between the parties. (1 Cyc., 514; Schlessinger v. Cook, 9 Wyo., 256; Matchette v. Wanless, 2 Colo., 169.) Generally an acknowledgment is no part of the contract between the parties, and the instrument is valid without it. (1 Cyc., 513; Frank v. Hicks, 4 Wyo., 502; Whalon v. Canal Co., 11 Wyo., 313; Linton v. Ins. Co., 104 Fed., 584; Schwartz v. Woodruff (Mich.), 93 N. W., 1067; Shoptaw v. Ridgway, 60 S. W., 723; Slattery v. Slattery, 120 Ia., 717.) An objection for want of sufficient acknowledgment goes to competency, and if not made on this ground is not available on appeal. (Schwartz v. Woodruff, *supra*.) Where the disqualifying interest of an officer taking an acknowledgment does not appear on the face of the instrument the record is constructive notice. (Bldg. Asso. v. Mensch, 196 Ill., 554; Read v. Loan Co., 68 O. St., 280; Bank v. Lawrence (Wash.), 73 Pac., 680; Stevenson v. Bracher, 90 Ky., 23; Cooper v. Hamilton, 97 Tenn., 285; Bennett v. Shipley, 82 Mo., 453; Titus v. Hove (Minn.), 47 N. W., 449; Corey v. Moore, 86 Va., 721; Morro v. Cole, 58 N. J. Eq., 203; Scott v. Thomas (Va.), 51 S. E.,

829; Jones v. Howard, 99 Ga., 451; 1 Cyc., 530.) But the defendant cannot raise the question, since he obtained no title by the receiver's sale. If the sale had been authorized and proper, there would still have been no transfer until confirmation. (Waumbach v. Gates, 8 N. Y., 138; Thompson v. Gould, 20 Pick., 135; Atty. Gen. v. Ins. Co., 94 N. Y., 199.) And if there had been confirmation the purchaser was bound to know the state of the title. The rule of *caveat emptor* applies. (Rorer Jud. Sales, 476; Baron v. Mullen, 21 Minn., 374.) Liens are not divested by receiver's sales. (Water Co. v. Dekay, 36 N. J. Eq., 548; Lorch v. Aultman, 75 Ind., 162; Blair v. Walker, 26 Fed., 73; Foster v. Barnes, 81 Pa. St., 377.) Here the receiver "succeeded only to the title of the judgment debtor and as to property incumbered by liens he had only such rights as the judgment debtor had at the time of the appointment." (Bank v. Cook, 12 Wyo., 515; Bell v. Shibley, 33 Barb., 614; Hyde v. Lynde, 5 N. Y., 392; Gardner v. Smith, 29 Barb., 68; Sayles v. Water Co., 141 N. Y., 603; Rider v. Rider (R. I.), 32 Am., 919; Manf. Co. v. Cassell, 201 U. S., 344; Stuart v. Hoffman, 31 Mont., 190.)

With respect to the attempt to show that some of the cattle were the property of Thomas Bird and not the property of the firm, this proposition, if established, could not avail the defendant. Thomas Bird was a party to the mortgages. He could not set up an adverse claim to the property; nor can any purchaser from him or any representative of him, not occupying the position of an innocent purchaser, assert any better right.

The defendant having asserted title in himself, demand was not necessary. (18 Ency. Pl. & Pr., 542; Newell v. Newell, 34 Miss., 385; Raper v. Harrison, 37 Kan., 243; Bank v. Bank, 46 Kan., 376; Smith v. McLean, 24 Ia., 323; Whitney v. Levon, 34 Neb., 443; Jackson v. Dean, 1 Doug. (Mich.), 519; Homan v. Laboo, 1 Neb., 209; 2 Neb., 291.) Under our statutes a mortgagee is not guilty of laches, thereby losing his rights, by failing to take posses-

sion upon maturity. The verdict and judgment were proper; the case became one for damages under the statute. The peremptory instruction to find for plaintiff was proper, since the proofs left only a question of law to be determined. (Jackson v. Betts, 9 Cow., 225; Kahn v. Ins. Co., 4 Wyo., 419; Bank v. Kindt, 7 Wyo., 321.)

H. V. S. Groesbeck, for plaintiff in error (on petition for rehearing).

One partner cannot by a general power of attorney authorize another to execute for him a firm chattel mortgage. (McManus v. Smith (Ore.), 61 Pac., 844; Weeks v. Rake Co., 58 N. H., 101; Cavanaugh v. Salisbury (Utah), 63 Pac., 39; Guthiel v. Gilmer, *id.*, 817; Peterson v. Armstrong, 66 *id.*, 767; Meyer v. Michaels (Neb.), 95 N. W., 63; Kahn v. Becnel, 108 La., 296; Lee v. Ferguson, 5 La. Ann., 532.) The *mala fides* of the transaction is apparent from the fact that some of the obligations were those of the individual partner who executed the mortgages. (Lance v. Butler, 135 N. C., 419; Hartness v. Wallace, 106 N. C., 427; Bank v. Bayliss, 41 Mo., 274; Garner v. Hudgins, 46 Mo., 399; Goddard v. McCune, 122 Mo., 426; Gibbs v. Bates, 43 N. Y., 192; Kimball v. Walker, 30 Ill., 482; Patterson v. Martin, 6 Ired. L., 111; Redenbaugh v. Kelton, 130 Mo., 558; Story on Part. (7th Ed.), 148.)

The better policy and more reasonable rule, sustained by excellent authority, is that an officer's disqualifying interest renders the acknowledgment void for all purposes, so that the instrument is not entitled to record and is not notice to anyone. (Kothe v. Krag-Reynolds Co., 20 Ind. App., 293; Wilson v. Traer, 20 Ia., 231; Bank v. Radtke, 87 Ia., 363; Bank v. Stockdale, 121 Ia., 748; Smith v. Clark, 69 N. W., 1011; Lee v. Murphy, 112 Cal., 364; Wasson v. Connor, 54 Miss., 351; Hayes v. Asso., 124 Ala., 663; Bexar Asso. v. Heady, 21 Tex. Civ., 154; Thurlough v. Dresser, 98 Me., 161; 1 Ency. L. (2d Ed.), 493, and cases cited; 1 Supp. Ency. L., p. 67, and cases cited.)

The plaintiff in error stands in the attitude of a bona fide creditor, as well as an innocent purchaser. The mortgages were not good against him without a proper acknowledgment in the absence of actual notice, and the notary was disqualified upon the proof offered. (*Edinger v. Grace*, 8 Colo. App., 21; *Asso. v. O'Lynn*, 95 N. W., 368; *Wilson v. Griess*, 64 Neb., 792; *Jenkins v. Jones*, 138 Ala., 664; *Crane v. Chandler*, 5 Colo., 21; *Wilcox v. Jackson*, 7 Colo., 521; *Sage v. Browning*, 51 Ill., 217; *Forest v. Tinkham*, 29 Ill., 141; *Rehkopf v. Miller*, 59 Ill. App., 662; *Hainey v. Alberry*, 73 Mo., 427; 33 L. R. A., 237, note; *Withers v. Baird*, 32 Am. Dec., 757, notes; *Springer v. Lipsis*, 209 Ill., 261; *Jones v. Noel*, 139 Ill., 381; *Van Heusen v. Radcliff*, 17 N. Y., 583; *Weill v. Zacher*, 92 Ill. App., 296; *Fahndrich v. Hudson*, 76 Ill. App., 641, 645; *McDowell v. Stewart*, 83 Ill., 538; *Bank v. Baker*, 62 Ill. App., 154.)

We think the objection to the introduction of the power of attorney on the grounds that it was incompetent, immaterial and irrelevant, was a sufficient objection as to the lack of proof that Julia A. Bird executed it. Her signature was not sworn to, and it was necessary to prove her signature, as the witness was without the jurisdiction. Thomas Bird could not and did not identify it. Without proof as to her execution of the instrument, it was not shown that Thomas Bird had any authority to execute the mortgage in her behalf, and it was void for that omission in the proof. (*Schouweiler v. McCaull*, 99 N. W., 95; *Barlow v. Collins*, 139 Ala., 543; 1 Curr. L., 55; *Elmslie v. Thurman*, 40 So., 67 (Miss.); *Carolan v. Yoran* (N. Y.), 104 App. Div., 488; *Power v. Goins* (Tenn.), 35 S. W., 902; *Paolillo v. Faber* (N. Y.), 56 App. Div., 241.) Creditors are entitled to attack mortgages. (9 Cent. Dig. Col., 2689-2692, Secs. 365, 566.) The acknowledgments to the power of attorney were not properly or sufficiently certified. (*Freedman v. Oppenheim* (N. Y.), 80 App. Div., 487.) It did not appear that William J. Bird was known to the officer certifying to his acknowledgment.

In this state it seems that a chattel mortgage is a mere lien or security, and no title passes until foreclosure and sale. (Byrd v. Forbes, 3 Wash. Ty., 318; Cadwell v. Pray, 41 Mich., 307; Wood v. Weimar, 104 U. S., 786.) The defendant was entitled to demand. (Wells on Replevin, 356, 371; Hull v. Carnley, 17 N. Y., 202; 7 Cyc., 2526; Roberts v. Norris, 67 Ind., 386.) The foreclosure sale of the chattels involved in the replevin suit would have been void even if it had been obtained from the sheriff as receiver, because it was in *custodia legis*, and the same reason should apply as to purchaser under the sheriff's sale. (Fulghum v. Williams, 114 Ga., 643; Jones on Chat. Mort., Sec. 443.) Where a chattel mortgage authorizes the mortgagor to sell the mere fact that a third person is in possession of the property, claiming ownership, does not show that his possession is wrongful, in the absence of proof that he did not acquire possession of the mortgagor. (Pritchard v. Hooker, 114 Mo. App., 605.)

It makes no difference that the sheriff was in possession under a void order, or that Boswell claimed his right to the cattle, in his pleading and by his evidence.

The sheriff was in possession of the property of Bird Brothers at the time of the foreclosure sale, and the foreclosure proceedings were void, and it was incumbent upon the mortgagee to take possession of the property, without breach of peace, when he desired to foreclose; but it did not have the possession of the property at any time. Furthermore, if an affidavit for renewal continues the mortgage in force for each succeeding year, then there will be no default in payment; and replevin will not lie to recover of a third person in possession property mortgaged to secure a debt, before maturity of the debt or any forfeiture under the mortgage. (Buck v. Payne, 52 Miss., 271; Boreger v. Langenberg, 42 Mo. App., 7.) And where it is agreed that the mortgagor shall retain possession (as where a renewal affidavit is filed) the mortgagee cannot maintain replevin against one who takes the chattel. (Pierce v. Stevens, 30 Me., 184; Laubenheimer v. McDermott, 5 Mont., 512.)

As to the duty of the mortgagee to exercise the right of sale or foreclosure within reasonable time, even after taking possession or not at all, see *Whittemore v. Fisher*, 132 Ill., 243. We think there are no authorities that permit a mortgagee to play fast and loose with the other creditors of his mortgagor, by constantly renewing the mortgage. At any rate, its lien became waived by its mistatement of the amount due in the last renewal affidavit, and by its failure to take possession under the foreclosure proceedings by statutory sale. (*Jones on Chat. Mort.*, 710.) And a mortgagee by selling in any other mode than in equity or in the manner provided by statute, waives all claim for deficiency. (*Jones on Chat. Mort.*, Sec. 711.)

The jury should have been permitted to decide whether the explanations of Thomas Bird and others were sufficient to overcome the presumption arising from the execution of the John Bird and Thomas Bird notes, and the bill of sale. The evidence in relation to the receiver proceedings should have gone before the jury, as a matter of excuse and justification, and perhaps in mitigation of damages.

POTTER, CHIEF JUSTICE.

This is a replevin action brought by the First National Bank of Laramie, to recover possession of fifty head of neat cattle. Upon the giving of an undertaking for that purpose as provided by statute, the property was re-delivered to the defendant below, plaintiff in error here, by the officer who executed the writ. The plaintiff below claimed to be entitled to the possession of the property by virtue of an alleged special ownership under two chattel mortgages purporting to have been executed to the plaintiff by Thomas Bird, William J. Bird and Julia A. Bird, co-partners doing business under the firm name of Bird Brothers. The defendant below was in possession, claiming the property under a sale by the sheriff acting as receiver of the property and effects of Bird Brothers in a proceeding in aid of execution instituted by a creditor of that firm subsequent to the execution and recording of plaintiff's mortgages.

The court instructed the jury that upon the evidence the plaintiff was entitled to recover the value of the property at the date of the commencement of the action, together with interest from that date at eight per cent per annum. The jury returned a verdict for the plaintiff, assessing its damages at the sum of \$1,830. Judgment was rendered upon the verdict to the effect that the plaintiff have and recover from the defendant the said sum, with costs of suit. The defendant brought the case here on error. The other material facts will be referred to in discussing the points involved in a disposition of the case.

1. In the first place it is contended that the mortgages held by plaintiff were not properly executed to create a lien upon partnership property. That contention is based upon the fact that the names of two of the partners, Julia A. Bird and William J. Bird, were signed to the mortgages by Thomas Bird, the other partner, as their attorney in fact. It is urged that this is not a compliance with the statute declaring it to be necessary for each and every member of a co-partnership to execute and acknowledge an instrument intended to operate as a chattel mortgage for and on behalf of the partnership. (R. S. 1899, Sec. 2808.) But we think that position cannot be sustained. Construing the statute referred to, it has been held essential to a valid chattel mortgage of partnership property that each partner should sign it. (*Lellman v. Mills*, 87 Pac., 985; *Thomas et al. v. Schmitz*, 87 Pac., 996; *Ridgely v. Bank*, 75 Fed., 808.) The plaintiff introduced in connection with the mortgages a power of attorney antedating them purporting to be executed by Julia A. Bird and William J. Bird, in substance and effect expressly authorizing their co-partner, Thomas Bird, as their true and lawful attorney, for them respectively and in their respective names, to mortgage any and all chattel property belonging to the partnership of Bird Brothers, to secure any and all indebtedness of said partnership or the members thereof, then or thereafter existing, and for such purposes to make, execute and acknowledge in

their names or otherwise any and all such conveyance or mortgage as may be needful or proper; and, by such written power, said Thomas Bird was expressly granted full power and authority to do and perform all and every act and thing requisite and necessary in the premises, as fully, to all intents and purposes, as the persons executing the same could do if personally present. Certain objections were interposed to the power of attorney which are to be considered, but for the purpose of the present question its proper execution and competency as evidence may be assumed. If it was not properly executed, or if for any other reason it was improperly admitted in evidence, then there would be no authority shown for the signing by Thomas Bird of the names of his co-partners, and his signature alone with that of the firm name signed by him would be insufficient to render the mortgages valid as liens upon the partnership property. But there is nothing in the statute nor any peculiar feature of the partnership relation, which prevents a partner, if under no legal disability, from appointing another, by means of a duly executed power of attorney, to act for him and in his name in the execution and acknowledgment of a partnership chattel mortgage, and we perceive no reason why the agent or attorney so appointed may not be a co-partner. The execution of the instrument by the attorney under such a power is to be regarded as the act of the principal, as much so as though he had been personally present and had signed by his own hand. Indeed, in *Thomas & Schmitz v. Schmitz*, *supra*, we took occasion to say that we supposed one partner might by a properly executed power of attorney authorize a co-partner as well as another person to sign his name to a chattel mortgage of partnership property and acknowledge it for him.

2. Error is assigned upon the court's refusal to permit proof on the part of defendant that the notary public who took the acknowledgment to each of the mortgages was at the time of taking the same a stockholder of the plaintiff bank, the mortgagee. Evidence to that effect was offered

for the purpose of showing that the officer was disqualified by reason of interest, which fact it is contended would render the acknowledgment void. A similar offer of proof was made as to the notary who administered and certified to the oaths to certain affidavits which had been filed as provided by law to continue the chattel mortgages in force as against third parties.

That an officer who is financially or beneficially interested in the transaction is incompetent to take and certify the acknowledgment to an instrument is a well settled and commendable rule, and is to be sustained if for no other reason upon the ground of public policy. By the great weight of authority the interest of a stockholder in a corporation is held to disqualify him to take an acknowledgment where the corporation is a party to the instrument. (*First Nat. Bank v. Citizens' State Bank*, 11 Wyo., 32.) It is generally stated that an acknowledgment is void when taken and certified by an officer disqualified by reason of interest, and that where an acknowledgment is essential to the validity of the instrument itself, the latter is also void if acknowledged before a disqualified officer—as in the case of a wife's conveyance of the homestead under our statutes. (*Id.*) The statement occasionally to be found in judicial decisions to the effect that an acknowledgment taken before an officer disqualified on account of interest is void for all purposes is not, we think, entirely accurate if intended to apply in all cases. Its correctness may be conceded in respect to instruments which are absolutely void without a proper acknowledgment, and also instruments which disclose the defect upon their face or the face of the certificate of acknowledgment. Where, however, the infirmity is not apparent upon the face of the deed or instrument or certificate of acknowledgment, but the acknowledgment appears to be fair and regular and to have been properly taken, and the instrument is one which would not be invalidated as between the parties to it by a defective acknowledgment, the recording of the instrument in the proper office will operate as con-

structive notice thereof, notwithstanding the latent defect. This rule is sustained by abundant authority and is founded upon public policy to carry out the purpose of the recording acts and preserve the reliability of the public records of transfers and conveyances. It is readily to be seen that a contrary rule would render unsafe any reliance upon the record of deeds or instruments requiring acknowledgment to entitle them to be recorded.

It is clearly not incumbent upon the recording officer to enter upon an extrinsic investigation before receiving for record an instrument regular on its face to discover whether the acknowledging officer was in fact disqualified because of interest. So far as the defect now being considered is concerned, if upon the face thereof the instrument is recordable and it is in fact recorded, the record should be held constructive notice to subsequent purchasers and others chargeable with record notice. (1 Cyc., 530, 553; 24 Ency L. (2d Ed.), 103; Ogden B. Ass'n. v. Mensch, 196 Ill., 554; Bank v. Hove, 45 Minn., 40; Peterson v. Lowry, 48 Tex., 408; Blanton v. Bostic, 126 N. C., 418; Stephens v. Hampton, 46 Mo., 404; Titus v. Johnson, 50 Tex., 224; Morrow v. Cole, 58 N. J. Eq., 203; Angier v. Schieffelin, 72 Pa. St., 106.) In the New Jersey case cited it was said: "Both reason and authority concur in declaring where the interest of the acknowledging officer does not appear on the face of the deed that the acknowledgment is not void, and that the registry of the deed is notice." The rule was stated in the Missouri case of Stephens v. Hampton, *supra*, as follows: "When the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice, notwithstanding there may be some hidden defect."

The chattel mortgages held by plaintiff were valid between the parties thereto even without an acknowledgment;

and as the acknowledgment appeared to have been properly taken and in every respect regular, the mortgages were entitled to be filed. They were filed and the record became notice to subsequent purchasers. Unless, therefore, the sale under which the defendant acquired possession discharged the mortgage lien he took with record notice of the mortgages and subject thereto. It is only on the theory that the mortgages if valid and subsisting liens would bind the property in defendant's possession that it became material to his case to attack the manner of their execution and acknowledgment. If the sale by the sheriff separated the property from the mortgage lien then the character and effect of the acknowledgment was immaterial. The sole purpose of the renewal affidavits was that of notice of the amount remaining unpaid of the debt secured by the mortgages that the latter might be continued in force against subsequent purchasers and other parties than the mortgagors. For the reasons above suggested as to the mortgages themselves, the affidavits must be regarded as sufficient to operate as constructive notice to all persons chargeable with record notice, since they did not disclose upon their face the alleged disqualification of the officer taking them. It is proper, however, to say that we refrain from deciding the unnecessary question whether in the case of such affidavits in general, an officer would be disqualified if a stockholder in the corporation for whose benefit they are made, where, as appears in the case at bar, the affidavit was made by an officer and agent of the corporation. We conclude, therefore, that the offers to show disqualification of the notary upon the grounds stated were properly refused.

3. The admission in evidence of the power of attorney to Thomas Bird purporting to have been executed by his co-partners is assigned as error. Its introduction was objected to on the following grounds, viz.: (1) Improper proof of execution. (2) Insufficient certificates of acknowledgment. (3) That it was a stale instrument and no proof that it had

not been revoked. (4) That it is not competent for a partner to authorize the execution of a chattel mortgage by an agent or attorney in fact. The point suggested by the objection last stated has been considered above and determined adversely to the contention of plaintiff in error.

The proof of execution consisted of the testimony of Thomas Bird, the agent appointed by the instrument, authenticating the signatures of the makers. It was and is objected that such proof upon the showing made was improper. By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other private writing having a subscribing witness is generally the testimony of such witness, if available, or if not then proof of his handwriting if that be feasible. If neither the testimony of the attesting witness nor proof of his handwriting be attainable, then it is competent to prove the signature of the grantor or maker of the instrument, and that will be sufficient. (Greenleaf on Ev., Secs. 569-575; 2 Wigmore on Ev., Sec. 1288, p. 1570.) But that part of the rule preferring proof of the signature of the attesting witness to that of the maker has not been universally accepted in this country. Some courts have maintained the admissibility of proof of the maker's handwriting directly upon its appearing that the testimony of the witness cannot be had. (Wigmore on Ev., Sec. 1320; Greenleaf's Ev., Sec. 575; Valentine v. Piper, 22 Pick., 85; Newsom v. Luster, 13 Ill., 175; McVicker v. Conkle, 95 Ga., 584; Landers v. Bolton, 26 Cal., 393; Sentney v. Overton, 4 Bibb, 445; Clark v. Boyd, 2 O., 56.) Mr. Wigmore in his recent valuable treatise above cited expresses the opinion that the preference aforesaid has been rarely supported by any reason, and attaches unusual importance to the extra-judicial statements of a third party, such as proof of an attester's signature practically amounts to.

An attesting witness who is not within the jurisdiction of the court is universally regarded as unavailable, and proof of that fact lets in secondary evidence; and it is equally

well settled that where the execution and attestation occurred out of the jurisdiction it is to be presumed, at least in the absence of contrary evidence, that the subscribing witness is out of the jurisdiction at the time of trial. (2 Wigmore on Ev., Sec. 1312, p. 1603.) The fact of execution and attestation abroad gives rise also to the presumption that proof of the handwriting of the witness is not attainable within the jurisdiction, so that in such event it is not incumbent upon the party offering the instrument to show otherwise that diligent and unsuccessful search has been made for proof of such handwriting. (*Newsom v. Luster*, 13 Ill., 175; *Landers v. Bolton*, 26 Cal., 393; *Woodman v. Segar*, 25 Me., 90; *Yocum v. Barnes*, 8 B. Mon., 496; *Gibbs v. Cook*, 4 Bibb., 535; *Clardy v. Richardson*, 24 Mo., 295; *Sherman v. Transp. Co.*, 31 Vt., 162.) That presumption is clearly a reasonable one where it does not appear that the subscribing witness ever resided within the jurisdiction. We cannot conceive that any particular strength would be added to the situation by evidence that inquiry had been made at a place where the witness had never been known to reside and that no one could be found there to identify his handwriting. The presumption of the absence of the witness from the fact of execution in another jurisdiction is uniformly accepted, and as said in the California case above cited, "No greater efforts or diligence should be exacted in endeavoring to prove the handwriting of the witness, than is required to find and procure the witnesses themselves."

In the case above cited from Vermont the only preliminary proof was that of the party who offered the instrument, who testified that he was not present at its execution, and did not know where it was executed except from what appeared upon its face, that he did not know the attesting witnesses, and did not know of their being in that state. The deed purported to have been executed out of the state, and its execution was permitted by proof of the handwriting of the grantor. Chief Justice Redfield, deliv-

ering the opinion, held that said secondary proof was proper upon the showing made, and he further declared what we understand to be the prevailing rule in such cases that whether the evidence is satisfactory respecting the absence of the witness is chiefly a question for determination by the trial court, which will not be revised on error if there is any testimony tending to show the fact.

Thomas Bird was called as a witness to prove execution and he was shown the instrument. Upon its face the makers, Julia A. Bird and William J. Bird, were described as respectively residing in Illinois and Wisconsin, and by the certificates of acknowledgment it appears that the acknowledgments were respectively taken in the state where the party making acknowledgment resided. It disclosed that there was one witness to the signature of each maker. Thomas Bird testified that the makers, his co-partners, did not reside in this state when the instrument was executed, but in Illinois and Wisconsin, respectively; and that Julia A. Bird had never been in this state. We understand his testimony to be to the effect also that, though William J. Bird had often been here, this state had never been his place of residence. He further testified that he knew that the attesting witness to the signature of Julia A. Bird had resided in Illinois at the place of residence of Mrs. Bird, and he supposed the other witness lived in Wisconsin where his brother William resided, though he did not know him. Thomas Bird resided in this state, and was the managing partner of the firm of Bird Brothers, whose business was carried on in the county where the cause was tried.

Upon the showing made by that testimony we think it sufficiently appeared that the document was executed out of the state, that the witnesses to its execution had attested it out of the state, and as there was no evidence of any kind to indicate that such witnesses were then or ever had resided in the state, or indeed that they had been here at any time, the presumptions aforesaid followed, and proof of the signatures of the parties whose names appear to have been signed to the paper became admissible.

We have assumed without deciding that the instrument is one requiring the attestation of a witness. Though the common law rule applies to private writings generally bearing the signature of an attesting witness, it has not been adhered to very strictly in this country in the case of instruments not required by law to be witnessed, even if witnessed in fact.

As a result of the recording acts and the provisions as to acknowledgment, the rule has lost some of its importance as to a large class of documents, because of the enactment of statutes either changing the method of proof or permitting instruments executed with certain formalities to be introduced without preliminary proof of execution. In our own state deeds or instruments conveying any interest in lands in this state which are executed, acknowledged and attested in accordance with the laws of the state in force at the date thereof may be read in evidence without in the first instance additional proof of execution, and that applies also to a power of attorney to convey lands as well as an executory contract for the sale or purchase of lands. (R. S. 1899, Secs. 2739, 2755.)

Counsel for plaintiff in error now argues that the proof as to the genuineness of the signature of Julia A. Bird was insufficient. But the instrument was not objected to on that ground when offered. The objection as to proof of execution as first interposed was as follows: "It has not been proved that these witnesses to the signature are beyond the jurisdiction of the court now and cannot be used as subscribing witnesses." The instrument was allowed to be read subject to the objections to be ruled upon later. In restating the objections at a later stage of the case and apparently immediately preceding the decision thereon, they were put in this respect as follows: "No sufficient reason is shown why the subscribing witness to each of the signatures were not present in court. No testimony has been offered to show that these were the signatures of the witnesses." The remaining objections did not refer to the proof of execution.

It is now argued that the manner of attestation was improper and constitutes a fatal objection. The instrument was attested as follows: "Signed, sealed and delivered in presence of James Bayne as to J. A. B. M. Michaelson as to W. J. B." The objection goes to the use of initials to designate the signatures respectively attested. Such objection was not made upon the trial, and is, therefore, not properly here for consideration. But we think the form employed is not unusual, and it would seem that the recital sufficiently shows that the first subscribing witness attested the signature of Julia A. Bird, and the other that of William J. Bird.

Objection is made to the certificate of acknowledgment as to each party. The only point suggested as to the certificate of the acknowledgment of Julia A. Bird is that it fails to state that she acknowledged the instrument to be her free act "and deed." It does certify that she acknowledged it to be "her free and voluntary act for the uses and purposes therein set forth" and thereby follows the permissive form provided by statute. (R. S. 1899, Sec. 2752.) The addition of the words "and deed" was not necessary. The certificate as to the other maker, omitting the caption and attestation of the officer, reads as follows: "Personally came before me William J. Bird, whose name is subscribed to the within instrument, and acknowledged same free and voluntary." That is objected to as insufficient, because too informal. The statute does not prescribe as essential any particular formalities in an ordinary certificate of acknowledgment. It provides generally that the officer shall endorse upon the instrument a certificate of the acknowledgment thereof and the true date of making the same, under his hand and seal of office, if there be one. (Id., Sec. 2741.) The form set out in Section 2752 is declared thereby to be sufficient, but its use is not made imperative. The certificate in question clearly shows that the maker personally appeared before the officer, and acknowledged his execution of the instrument to be free and voluntary. Even where a

statute requires a certificate to state that the person making the acknowledgment is personally known to the officer, it is held that a statement that the one whose name is subscribed to the instrument "personally appeared" before the officer is sufficient, because it necessarily implies that he was personally known. (*Warder v. Henry*, 117 Mo., 530; *Schley v. Pullman Car Co.*, 120 U. S., 575.) It appears to us that the certificate contains every element essential to show the fact of acknowledgment and is, therefore, not objectionable as to form under our statutes.

The further objection that the omission of the year from the certificate renders it fatally defective is a more serious one. The certificate is dated "this 29th day of July," and the officer states that his commission expires April 11, 1893. The instrument itself is dated July 17, 1891, and the certificate of Julia A. Bird's acknowledgment shows that it was taken July 21, 1891. Though the statute requires that the true date of making the acknowledgment shall be stated in the certificate, the rule in such cases is that it is sufficient if the date appears by evidence within the instrument itself. (1 Cyc., 572; *Kelly v. Rosenstock*, 45 Md., 389; *Chase v. Whiting*, 30 Wis., 544; *Sloan v. Thompson*, 4 Tex. Civ. App., 419.) In *Chase v. Whiting*, *supra*, the Wisconsin court said as to an acknowledgment dated the "first day of November," omitting the year, that it might be fair to presume that the acknowledgment was of even date with the deed, which was November 1, 1853, but held that at all events it must be assumed to have taken place before the recording of the deed. To the same effect is the Maryland and Texas cases above cited. Here the recording did not occur until after the stated expiration of the notary's commission, and the recording date is, therefore, of no material assistance. But as the instrument appears to have been made and executed on the seventeenth day of July, in the year 1891, and acknowledged by one of the parties a few days later, it is a proper presumption that the other acknowledgment bearing a date in July occurred in the same month

and year. A certificate of acknowledgment is to receive a liberal construction and the holding is general that where an omission can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be sufficient.

The objection that the instrument was a stale one and that its revocation was not negatived is without merit. It was executed in 1891, recorded in 1896, and the first of plaintiff's mortgages here involved was executed in 1898. Whether or not any other mortgages had been given under the power granted by the instrument is not positively shown nor was a showing in that respect at all essential. Our attention has not been directed to any statute nor do we know of any rule that required the recording of the paper within any particular period. The power granted was a continuing one; the execution of mortgages was authorized to secure any partnership debts then or thereafter existing. Immediate exercise of the power was not required either by the terms of the instrument or by reasonable implication. There is nothing in the language employed in describing the acts to be performed or in the nature thereof that limited the power conferred to a particular transaction; and it is not apparent that any circumstance other than a dissolution of the partnership would cause a termination of the authority granted by operation of law. The partnership appears to have continued without interruption until after the execution of the mortgages in question and indeed until shortly before the commencement of this action. Revocation by act of the parties, at least during the existence of the partnership, is not to be presumed. There is no ground, therefore, for holding it to have been incumbent upon the plaintiff to show affirmatively that the power of attorney had not been revoked.

4. It is contended that one of the notes secured by plaintiff's first mortgage was improperly included therein, and that the remainder of the mortgage indebtedness appeared to have been more than satisfied at the time of trial,

so that by excluding such note plaintiff would be left without any interest in the mortgaged property. The contention is based on the fact that the note in question was signed by one John Bird and made payable to Bird Brothers, though the latter, apparently at the time of the making thereof, indorsed it to the plaintiff and by a separate indorsement guaranteed its payment. The mortgage was expressly given to secure the payment of a stated sum according to the tenor and effect of ten certain promissory notes set out by copy in the mortgage, including the note aforesaid—the copy so set out showing the indorsements of Bird Brothers, the mortgagors. It was shown by uncontradicted evidence that John Bird, not a member of the firm, had signed the note solely for the latter's accommodation, and that it represented in fact an indebtedness of the firm to the plaintiff. It came, therefore, clearly within the authority granted by the power of attorney to Thomas Bird. The note was but the evidence of the debt, and it matters not what the purpose was in making the note in the form stated, so long as that purpose could not be legally questioned by the mortgagors or the defendant. Not only was the debt primarily that of the firm, but the plaintiff had its written obligation through the general indorsement and guaranty; the fact that John Bird had also bound himself as maker did not render the note any the less a partnership debt capable of sustaining a partnership mortgage.

5. It is contended on several grounds that the petition is insufficient to support a judgment. The first point suggested in this connection is that the failure to allege venue, referring to the place of the unlawful detention, constitutes a fatal defect. In some jurisdictions replevin is a local action, and must be brought where the goods are detained; and where that is the case it is held that an allegation of the jurisdictional fact is essential. It might perhaps be questioned even under such conditions whether an absence of the averment would be regarded as fatal at least after verdict where, as appears in the case at bar, the chattels were

shown by the officer's return to the writ to have been found and taken in defendant's possession in the county in which the suit was brought. But waiving consideration of that question, the reason for such an allegation does not exist under our practice. The action of replevin in this state is not local, but may ordinarily be brought in the county where a defendant resides or may be summoned, under Section 3505, Revised Statutes of 1899. After providing in preceding sections that certain actions relating to real estate must be brought in the county where the subject of the action is situate, and that other specified actions must be brought in the county where the cause, or some part thereof, arose, and regulating the venue for still other actions, none of them including a suit in replevin against an individual defendant, not a corporation, it is declared by the section above cited that "every other action must be brought in the county in which a defendant resides or may be summoned," with the exception of actions against an executor, administrator, guardian or trustee, which may be brought in the county wherein he was appointed or resides.

By reference, therefore, to the provisions of the chapter of the code upon the subject of venue, it appears that jurisdiction in replevin does not depend upon the location of the property or the place of the wrongful detention. But the statutory provisions relating particularly to replevin make the proposition even more clear. If the property is not taken, the action may proceed as one for damages only. (R. S. 1899, Sec. 4158.) And an order for delivery, which is obtainable at or after the commencement of the action upon filing the prescribed affidavit, may be directed to any county, and several orders may issue at the same time, or successively at the option of the plaintiff. (Id., Secs. 4146, 4159.) The locality of the detention being, therefore, unimportant in respect to the venue of the action, it is very clear that an averment in support of venue is not required. (Hodson v. Warner, 60 Ind., 214; Hoke v. Applegate, 92 Ind., 570; Fry v. Shafor, 164 Ind., 699.)

It is next argued that instead of alleging a "wrongful" detention, as in this petition, the detention should be alleged to be "illegal." Replevin is usually defined as an action for the recovery of chattels wrongfully taken and detained or wrongfully detained; and the gist of the action is indifferently stated to be the "wrongful" or "unlawful" detention. A distinction between those words as applied to the detention sufficient to support the action does not seem to have been recognized. (Wells on Replevin (2d Ed.), Sec. 31; Cobbey on Replevin, Sec. 12.) Approved forms usually allege that the defendant "wrongfully" detains the property. And to secure an order of delivery under the statute the affidavit is only required to state in this connection that "the property is wrongfully detained by the defendant." If the detention is wrongful it will be illegal or unlawful, in the sense in which those words are applied to the detention of personal chattels from the possession of a plaintiff entitled thereto. The objection is not well taken. (Grever v. Taylor, 53 O. St., 621; Haggard v. Wallen, 6 Neb., 271.)

It seems to be further contended that without an allegation that the plaintiff had been in possession the petition is insufficient upon the ground that a special property is not complete until actual delivery. Under some circumstances it may be true that a special ownership of specific chattels would not be acquired until taken into possession. But that a mortgagee may maintain replevin upon default in the conditions of the mortgage even though he has never had actual possession is well settled; indeed too well settled to require discussion or citation of authority. (Schlesinger v. Cook, 9 Wyo., 256.) The petition here alleges the execution and material terms and conditions of the mortgage, and the occurrence of the default entitling the plaintiff as mortgagee to possession. Where the mortgagor is permitted by the mortgage to continue in possession until default or until the mortgagee shall elect to take possession, a demand therefor before suit is usually essential to render

the possession of the mortgagor, or the one claiming under him subject to the mortgage, wrongful; and demurrer might lie to a petition in replevin brought by the mortgagee in such case not alleging a demand, or circumstances sufficient to amount to a waiver thereof, or at least facts sufficient to let in proof thereof. There was, however, no demurrer here, and the petition contains an averment not only that the defendant wrongfully detains the property, but that the chattels described "have been seized and claimed by the defendant." Whether the latter statement would be sufficient to show an assertion of ownership by defendant as against the mortgages so as to avoid a demurrer, on the ground that demand would be manifestly unavailable and, therefore, unnecessary, need not be considered, since the defendant for reasons presently to be explained in discussing the instructions, is not in a position to insist upon allegation or proof of prior demand, nor need the sufficiency of the allegation of wrongful detention to authorize proof of demand be considered.

6. The court instructed the jury that upon the evidence the plaintiff was entitled to recover the value of the cattle in controversy, and refused to instruct them at defendant's request to the effect that if no demand upon the defendant for possession, by or on behalf of the plaintiff before the commencement of the action, had been shown, the defendant would be entitled to the possession of the property. It may be conceded that where the original taking was not wrongful a demand is as a rule necessary to put the right of possession in the plaintiff. But demand or proof thereof may be waived, not only by the previous conduct or assertions of a defendant in possession showing that a demand would not have been complied with, but also by his attitude in the suit. This principle is stated in Wells on Replevin (2d Ed.), Sec. 373, as follows: "Cases often arise when the defendant would be entitled to a demand, but has done some act or made some declaration which excuses the plaintiff from making it. Proof of any circumstance which would

satisfy a jury that a demand would have been unavailing (as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver) will be sufficient to excuse proof." And in Section 374 it is said: "Where the defendant sets up a claim of ownership and demands a return of the goods, this claim is inconsistent with any hypothesis that he would surrender them on demand, and will obviate the necessity of proving demand." (See also *Bunce v. McMahon*, 6 Wyo., 24.)

The reason of the rule requiring demand where the original taking was not wrongful is that the possession under a lawful taking must be regarded as rightful until someone having a superior right has asserted the same by asking that the property be delivered to him, and so the law presumes that a defendant who acquired possession rightfully will respect the rights of the true owner on being informed thereof, and deliver the possession at once on request. (*Wells on Replevin* (2d Ed.), Sec. 346.) Where, therefore, it appears from the declaration, conduct or claims of a defendant that a demand would have been a mere idle ceremony it is excused. It is evident that a defendant may by his own conduct in respect to the property overthrow the presumption that he would have delivered it upon demand, and it is well settled that such result will follow a claim made in the suit either by the pleadings or upon the trial which is inconsistent with the supposition that the defendant would have complied with a previous demand. As said in one case, "Where the defendant claims to be the owner of the property, he ought not to be permitted to set up such claim (want of demand) and thus defeat a recovery by plaintiff, under the pretense that he would have surrendered the property had he been requested so to do." (*Howard v. Braun*, 14 S. D., 579.) Other authorities are numerous upon the proposition, a few only of which need be cited. (24 Am. Eng. Ency. L., 510; *Wells on Replevin* (2d Ed.), Note XXII, pp. 322-324; *Lewis v. Smart*, 67 Me., 206; *Merrill v. Denton*, 73 Mich., 628; *Leek v. Cresley*, 98 Ia.,

593; Bunce v. McMahon, *supra*; Greenberg v. Stevens, 212 Ill., 606; Denver L. S. Commission Co. v. Parks (Colo.), 91 Pac., 1110.)

Though the defendant's answer contains as a first defense a general denial of the allegations of the petition, it alleges in other separate defenses that he is the owner of the property; that the mortgages described in the petition are fraudulent and void and without consideration, and executed without authority from two members of the partnership of Bird Brothers (the mortgagors); that they were not in force at the commencement of the action; that the defendant became the lawful and rightful owner under a sale by the sheriff as receiver of the property and effects of Bird Brothers, and is entitled to the sole use and benefit of said property and the exclusive possession thereof; and that plaintiff never had either a general or special ownership in the property and was never entitled to its possession. And the answer contained a prayer that the defendant be adjudged to be the owner and entitled to the sole and exclusive possession of the property, and judgment for damages.

If it be assumed that all the affirmative allegations might have been shown under the general denial, and that the latter required proof of demand, notwithstanding the specific allegations, then it appears that upon the taking of the property by the officer in executing the order of delivery issued at the commencement of the action, the defendant, as permitted by statute, gave an undertaking which required and was followed by a redelivery of the property to him; that upon the trial he admitted having disposed of some of the cattle, and that he attempted to defend his possession by proof of the invalidity of plaintiff's mortgages, and of his ownership free of the lien thereof by virtue of the receiver's sale. It matters not that the evidence offered in opposition to the validity and lien of the mortgages and in support of his claim of title was excluded. He excepted to such exclusion and is here complaining of it; and the fact remains

that his assertions and conduct upon the trial were inconsistent with the presumption that he would have delivered the property to plaintiff upon demand. Under the circumstances, therefore, the defendant cannot be heard to complain of the absence of evidence to show a demand. The instruction requested was, moreover, erroneous, since it eliminated all consideration of the facts pertinent upon the question of waiver of demand or proof thereof.

7. It is further contended as a ground for reversal that since the mortgages of plaintiff matured respectively May 26, 1900, and January 1, 1901, and this action was not brought until March 12, 1903, nor possession of the mortgaged property taken within that period by the plaintiff as mortgagee, the rights of the latter as against creditors and subsequent purchasers had become lost by its laches, upon the theory that it is the duty of a mortgagee of chattels in order to preserve his lien against such third parties to take possession within a reasonable time after default.

This position cannot be sustained upon our statutes and the facts in the case showing a compliance therewith. In the first place it is expressly permitted by statute to insert in a chattel mortgage a provision authorizing the mortgagor to use, handle, operate, herd, manage and control the mortgaged property, and to market, sell and dispose of such portions thereof as may be necessary in the course of business, or to preserve and care for the same, and replace such property, or parts sold, with other property of like kind or character, all of which shall be subject to the operation and effect of the mortgage. (R. S. 1899, Sec. 2818.) And the mortgages here provided that until default the mortgagor might retain possession of the property and use, handle, manage and control the same.

The statute further declares that a chattel mortgage filed as required shall remain in full force and validity for the term for which it shall be given, and for sixty days thereafter, and that after the expiration of such sixty days after maturity it shall cease to be valid as against creditors, and

subsequent purchasers or mortgagees in good faith, unless before the expiration thereof notice of foreclosure shall be given as required by law, or the mortgagee, his heirs, legal representatives, or assigns, or the agent or attorney of the mortgagee or his assigns, shall make affidavit exhibiting the interest of the owner and holder in such mortgage, and the amount yet due and unpaid, which affidavit is to be filed in all respects as the original mortgage; and thereupon it is provided that the original mortgage shall continue in full force and virtue for the period of one year after the term for which it was originally given; and a like affidavit may be filed within sixty days after the expiration of said period of one year continuing thereby the mortgage in force another year, and under the same conditions and within the same limitation a like affidavit may be filed to renew the mortgage for each succeeding year thereafter until the debt secured thereby shall be fully paid. (Id., Sec. 2817.) The statute clearly implies that the filing of a mortgage is a substitute for the transfer of possession. (Id., Sec. 2811.) And that is the usual purpose and effect of recording statutes. (6 Cyc., 1063; Keenan v. Stimson, 32 Minn., 377.) The same effect is given after maturity to an affidavit filed in renewal of a filed mortgage, since such an affidavit when filed excuses foreclosure proceedings and continues the mortgage in full force and virtue for the prescribed period. That the purpose of the affidavit is notice to purchasers and others is evident not only from the provision respecting its making and filing, but from the duty imposed upon the recording officer to note the filing of each renewal affidavit upon the original mortgage in his office and also upon the index book opposite the original record of the instrument. (Id., Sec. 2817.) The mortgages in controversy were duly filed and the renewal affidavits were also filed as shown by the record, and there is no suggestion that they were not filed in time to continue the mortgages in force. It would in effect abrogate the statute to hold that a mortgagee is required not only to file a renewal affidavit, but to take pos-

session also upon maturity of the mortgage debt to continue the priority of his mortgage lien, or to protect his rights against a charge of fraud.

8. Prior to the execution of plaintiff's first mortgage another bank located in the same city with plaintiff held an unpaid note of Bird Brothers for \$8,000, apparently secured by a mortgage or pledge of cattle and hay; and also three notes signed by Thomas Bird for \$1,000, \$500 and \$200 respectively. The plaintiff advanced the money to take up these notes, and the amount so advanced entered into the consideration of the mortgage and was included in the notes of even date therewith and thereby secured. The additional sum of \$6,000 was also paid into such other bank by plaintiff to cover the purchase price of 150 head of cattle sold by the cashier of such bank, which amount was also embraced in said several notes and became a part of the consideration of said mortgage. The bill of sale for the cattle was made out by the vendor to Thomas Bird, and, as the vendor testified, was handed to the plaintiff bank. It was dated May 27, 1898, while the mortgage was dated May 26, 1898. It did not appear that Thomas Bird either directed the bill of sale to be made out in his own name, or knew that it had been so drawn until the trial. He testified without contradiction that he bought the cattle for the partnership, and that the latter had possession of the cattle several days before the payment of the purchase price, and before the execution of the mortgage to plaintiff; and the price was advanced by plaintiff on the credit of the firm whose obligations it took therefor. There is nothing in the evidence outside the bill of sale even tending to show that Thomas Bird ever claimed to be the individual owner of such cattle. The purchase price was paid on the day the mortgage was executed, and evidently to complete a purchase which had been previously agreed upon. Thomas Bird also testified, and in this respect also his testimony stands undisputed, that his notes held as aforesaid by the other bank were given for money borrowed for and on account of the firm;

and that he did no business except for the partnership. It is also undisputed that he was the resident and managing partner. The plaintiff bank, as appears from the evidence beyond controversy, understood that the money advanced by it was loaned to the partnership.

Upon the above facts we think there is no reasonable ground for the contention that the amount represented by the three Thomas Bird notes constituted his individual indebtedness, and was, therefore, improperly and fraudulently included in the partnership mortgage. Standing alone, the notes themselves would raise the presumption that Thomas Bird and not the firm was the debtor; but the presumption would not be conclusive. The question here is not who would have been liable on the notes had suit been brought thereon, but whether the partnership mortgage attempted to secure the individual indebtedness of Thomas Bird as distinguished from partnership indebtedness.

This question was raised by a request on behalf of the defendant for an instruction to the effect that if any part of the indebtedness secured by the mortgage was not a partnership obligation it should be deducted from the amount remaining due and if sufficient to discharge the same, then the verdict should be for the defendant. The instruction was refused, and, as previously stated, the court directed a verdict for the plaintiff, submitting only for the consideration of the jury the amount of the damages to be recovered. It was formerly held under what is known as the "scintilla of evidence" rule that whenever there is any evidence, however slight, tending to prove an issue, it must be submitted to the jury, or, as otherwise stated, that "a verdict may be directed only where there is no evidence, however slight, and no inference to be drawn from the facts which will support the opposite theory." Upon that rule, if a party produced a scintilla of proof in his favor he was entitled to have his case submitted to the jury. (6 Ency. Pl. & Pr., 675-676.) That doctrine grew out of the extreme reluctance of the courts to invade the province of the

jury, but according to the modern and more reasonable view the scintilla rule fails to carefully discriminate between the prerogatives of the court and jury, and is deemed to require the submission of evidence to a jury which might afford no reasonable justification for a verdict. The power of the court to invade the province of the jury is still uniformly denied, but there is apparent confusion in the authorities when it comes to stating a test or principle which would be applicable generally in determining the propriety of directing a verdict either upon the whole case or some particular issue.

It is generally agreed that a question of fact must be passed upon by the jury and a question of law determined by the court, and that the credibility of witnesses, and the weight of conflicting testimony are questions of fact. That it is the function of the jury and not the court to decide which way contradictory evidence preponderates is conceded; and also that if the evidence produced by a party is insufficient in law to authorize a finding in his favor, it is the right and duty of the court to so hold and peremptorily instruct in reference to it. Many courts hold that in determining when a verdict should be directed a proper criterion is whether a different verdict would necessarily be vacated as contrary to the evidence. (*Pleasants v. Fant*, 22 Wall., 120; *Ketterman v. R. R. Co.*, 48 W. Va., 606; *Offutt v. Columbian Exposition*, 175 Ill., 472; *Los Angeles F. & M. Co. v. Thompson*, 117 Cal., 594.) The correctness of that test is denied in New York, because, as said by the court of appeals of that state, the results of directing a verdict and setting one aside are widely different, since where a verdict is set aside a new trial is ordered, but a verdict directed forever concludes the parties. (*McDonald v. Metropolitan St. Ry. Co.*, 167 N. Y., 66.) They, however, say: "If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to

determine it," and again: "If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover."

It is said in Wisconsin that the rule to the effect that if there is any evidence to establish a disputed fact, and a conflict in that regard, the question is for the jury, should be construed as calling for evidence worthy of belief in regard to the subject, and, "if the truth of the proposition be not within the range of probabilities, in the light of reason and common sense, in view of facts of common knowledge, or facts established in the case beyond reasonable controversy, then evidence of the existence of the fact involved does not prove such existence, or tend to prove it." In regard to the case then before the court the following principle was deduced: "If the evidence of plaintiffs, taking the most favorable view it will reasonably bear, including all reasonable inferences therefrom, assuming that it establishes all that it tends to establish when viewed in the light of undisputed facts, would support a verdict in plaintiff's favor, then the case should have been submitted to the jury for decision, and we should say that the evidence is sufficient for such verdict, if, in view of conceded or undisputed facts in plaintiff's evidence, there is room for unbiased minds to reasonably differ as to where the truth lies, not regarding, in reaching that result, mere conjecture or possibility." (*O'Brien v. R. R. Co.*, 102 Wis., 628.) Without going further into the general question, we refer to 6 Ency. Pl. & Pr., 675-687, where the numerous authorities are cited and the views entertained in the various jurisdictions explained.

In *Riner v. New Hampshire Ins. Co.*, 9 Wyo., 81, 446, the direction of a verdict was held erroneous on the ground that a material question of fact arose upon the evidence which was for the jury to determine. In *Kahn v. Traders' Ins. Co.*, 4 Wyo., 419, the court held that a peremptory in-

struction as to the effect of a particular fact in that case should have been given, since the facts were plain, simple and undisputed, and there was no question of fact for the jury's determination. Speaking for the court, Mr. Justice Clark said: "When the evidence to a fact is positive and not disputed or questioned, it ought to be taken as an established fact, and the charge of the court should proceed upon this basis."

In the case at bar, the disputed fact, so far as the point now being considered is concerned, was whether the mortgages held by plaintiff were valid in respect to consideration and good faith. The only facts in the evidence tending to support defendant's theory outside of the John Bird note above considered were that a small part of the consideration had previously been represented by the personal notes of Thomas Bird to another bank, and that the bill of sale of certain cattle bore date on the day following the date of plaintiff's mortgage, and conveyed the cattle to Thomas Bird. But the presumptions arising from such facts were completely overcome by the undisputed testimony of Thomas Bird, and the further undisputed fact that firm obligations were given to the plaintiff bank for the money it advanced, without any apparent questioning thereof at any time thereafter by the firm or any member thereof; and, as testified by the cashier of the plaintiff, that the money was loaned to the firm. Moreover, the purchase price of the cattle mentioned in the bill of sale was advanced by the plaintiff, who took therefor the firm notes, and there was not the slightest contradiction of Thomas Bird's testimony that he bought the cattle for the partnership, other than the presumption which might have arisen upon the bill of sale if unexplained. His statement that he did no business except for the company remained uncontradicted, and not a single circumstance tending to discredit it was brought out in the evidence. In reference to this matter, therefore, the fact stood established that, although the bill of sale was drawn as stated, and Thomas Bird had given his individual notes for

some of the debt before the transaction with plaintiff, the cattle were bought for and delivered to the firm, and the notes were made for money borrowed for and received by the firm. The question then became one of law whether upon such facts plaintiff's mortgage attempted to secure the payment of money not in reality a debt of the partnership. As said in a Michigan case: "When the testimony of *bona fides* is thus undisputed, it is proper for the court to direct a verdict." (Drover's Nat. Bank v. Potvin, 116 Mich., 474.) So far as this point is concerned, therefore, the instruction requested was correctly refused, since it would have been misleading and inapplicable upon the evidence, and the peremptory instruction was proper. The facts do not sustain the contention that the firm mortgaged cattle not belonging to it.

9. It was conclusively established upon the evidence that the amount due and unpaid upon the obligations secured by the mortgages, after giving all proper credits, largely exceeded the value of the property in controversy. That fact and the occurrence of default in the mortgage conditions before the commencement of the action gave the plaintiff the right of possession, unless a superior right should be established. All objections interposed to the mortgages, their validity, consideration and good faith, have been considered and found to be untenable. The defendant sought to show ownership and right to possession in himself through a purchase from parties to whom the property had been sold by the sheriff, acting as receiver of the property and effects of Bird Brothers under an appointment in a proceeding in aid of execution instituted by a judgment creditor of said firm. He produced a bill of sale from the sheriff to defendant's vendors and a similar instrument from them to him; and the fact that a sale had actually occurred between the parties to each of those instruments followed by transfer of possession was shown, and also that at the time he sold the property the sheriff was in possession by virtue of his said appointment as receiver.

Defendant thereupon produced and offered, in the order in which they appeared in the cause wherein the appointment of receiver had occurred, the various papers and court orders leading up to and culminating in an order of the district court authorizing the sale of fifty head of cattle for the purpose of creating a fund to maintain and care for the property in the receiver's hands, consisting of real estate, several hundred cattle and considerable personal property. The papers were admitted temporarily, subject, as the court stated, to all legal objections, leaving the question of their relevancy to be determined upon the whole record when all that should be deemed material had been presented. It finally appeared that the order of sale had been subsequently reversed and vacated by this court on error, and that pending the proceedings in error, and on the same day as the receiver's sale, though apparently too late to prevent the same, an order had been entered by this court staying proceedings upon the order appealed from. The evidence in relation to the receiver's proceedings was thereupon excluded. The order aforesaid was reversed in the case of *Cook v. Bank*, 12 Wyo., 492, and it will be unnecessary to here repeat the grounds thereof, except to say that it was held to have been entered without jurisdiction. The rights and duties of a receiver in a proceeding supplementary to execution under our practice were considered at length in that case, and the conclusion reached that the appointment of the receiver did not operate to divest prior valid and subsisting liens, nor authorize a sale of property in disregard of such liens to pay the receiver's expenses.

Upon the evidence in support of the receiver's sale it, therefore, appeared as a matter of law that the defendant had acquired by his purchase, if anything, no more than whatever interest Bird Brothers, the judgment creditors, had, subject to plaintiff's mortgages. With or without the excluded evidence, the defendant's interest was shown to be subordinate to that of the plaintiff; and since the plaintiff's interest embraced the entire value of the property, the de-

fendant was not entitled in law to recover anything. No question of fact except on the subject of damages remained in the case, or would have remained even had the record evidence not been stricken out. A peremptory instruction to find for the plaintiff was, therefore, justified.

10. Following the instruction of the court that the plaintiff was entitled to recover the value of the cattle in controversy, the jury returned a verdict finding generally for the plaintiff and assessing its damages at the sum of \$1,830. Thereupon judgment was rendered in favor of the plaintiff and against the defendant for the amount of the damages so assessed with costs. It is contended that the verdict and judgment are insufficient under our statutes, for the reason, as stated in the brief of plaintiff in error, that the jury should have found, not generally for the plaintiff, but that it was either the owner or entitled to possession of the property, and then assessed such damages as were found to be right and proper, and that a judgment merely for the value of the property is not contemplated by the law.

The proposition relied on in support of the above contention seems to be that the code requirements as to verdict and judgment must be complied with, and that a failure in that regard is ground for reversal. Upon the circumstances of this case, however, the proposition is not applicable, since the statute contains no provision concerning the form of either verdict or judgment, where, as in this case, the defendant has obtained a redelivery of the property taken upon the writ, and retained it, upon giving the statutory undertaking for that purpose.

Until the amendment of 1897 (S. L. 1897, Ch. 43) there was no authority in the statute for the giving by a defendant in replevin of a redelivery bond, but, except in the case of an heirloom, or relic, which might be retained by the officer executing the writ subject to the order of the court, property taken upon a replevin writ was required to be delivered to the plaintiff, upon the giving by him of an undertaking as prescribed by the statute, or returned to the defendant, if

such undertaking was not given within the period allowed therefor. Thus, under the code prior to the act of 1897, property sought to be recovered in a replevin action would, if taken upon the writ, or order of delivery, as it is designated in the statute, be either delivered to the plaintiff, or returned to the defendant for failure of the plaintiff to give an undertaking, or, in case of a peculiar kind of property, such as an heirloom, etc., it might remain in the sheriff's hands. (R. S. 1887, Secs. 3025-3029; R. S. 1899, Secs. 4150-4154.)

In the related sections regulating verdict and judgment in such an action no other contingency was, therefore, provided for in case of property taken upon the writ. The nature of the recovery was and is specified in the event of judgment for defendant on demurrer, or failure of plaintiff to prosecute the action, or upon the issues joined when the property is delivered to the plaintiff, or remains in the sheriff's hands; and also in the case of judgment for plaintiff upon the issues or on default when the property has been delivered to him, or redelivered to defendant for want of an undertaking by plaintiff, or remains in the sheriff's hands, or has not been taken. (R. S. 1887, Secs. 3030-3033; R. S. 1899, Secs. 4155-4158.) The statute clearly distinguishes between an official taking upon the writ and a subsequent delivery to plaintiff or redelivery to defendant; so that it is plainly impossible to apply the provisions of Section 4158 of the revision of 1899, permitting the action to proceed as one for damages when the property has not been taken, or has been redelivered to defendant for want of an undertaking by plaintiff, to the case here presented where the defendant has obtained a redelivery upon giving the statutory undertaking. The condition of the authorized undertaking further increases the difficulty of applying the provisions of that section to such a case.

The provisions as to judgment cover every contingency that could have arisen under the statute prior to its amendment, except that property remaining in the sheriff's hands

was governed by the general direction that it be held subject to the order of the court. In 1897 Section 3026 of the revision of 1887 was amended, and as amended it is now Section 4151 of the revision of 1899. Into that section, which originally provided for property having a value not wholly marketable, such as an heirloom or relic, to be retained by the sheriff, was incorporated, by the amendment aforesaid, a provision authorizing the defendant, within a stated time from the levying of the writ, to furnish an undertaking to the plaintiff to the effect that the defendant will deliver the property to the plaintiff, if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, and requiring the sheriff thereupon to redeliver the property. No express change was made in the provisions regarding the judgment to be recovered in the action.

It was not the original theory of the statute that property once taken upon a replevin writ, and either delivered to the plaintiff, or redelivered to the defendant, should be returned, or that its return should be adjudged. Plaintiff's undertaking was and is required to be to the effect that he shall duly prosecute the action and pay all costs and damages which may be awarded against him. (R. S. 1887, Sec. 3025; R. S. 1899, Sec. 4150.) The action was and is allowed to proceed as one for damages upon the failure of plaintiff to give an undertaking, and a redelivery for that reason to the defendant; and there is no provision for a judgment requiring a return to plaintiff in that case. The plaintiff's undertaking, when given, stands in the place of the property to the extent of defendant's interest, and the property passes into the exclusive possession and control of the plaintiff. (Smith v. McGregor, 10 O. St., 461; Uphaus v. Miller, 68 O. St., 401; Union Pac. R. R. Co. v. U. S., 2 Wyo., 170.)

The amendment of 1897 introduced a new element or theory into the statute, by authorizing the defendant to obtain a redelivery upon undertaking with sufficient sureties

to "deliver the property to the plaintiff" if that should be adjudged. The silence of the statute upon the question of recovery in such case makes necessary the application of the rule in that respect in the common law actions of replevin and detinue, for which the statutory action is a substitute. Replevin at common law required as its foundation an unlawful taking, while detinue proceeded for a wrongful detention, where the original taking had been lawful; but in modern practice, at least in this country, the gist of the action is the wrongful detention, whether the original taking was lawful or unlawful; and that is the case under our statute. In the common law action, where the goods were not obtained upon the writ by the plaintiff, the judgment was in the alternative, if he succeeded, that he recover the property, or in case a delivery cannot be had that he recover the value thereof. (Bouvier's L. Dict. (Rawle's Rev.), p. 565; 2 id., p. 885; 3 Bl. Com., 151; 2 Tidd's Pr., 887; Cobbey on Replevin, Sec. 1105; Wells on Replevin (2d Ed.), Sec. 772; 18 Ency. Pl. & Pr., 591-598.)

In view of the general rule and the prescribed terms of the defendant's undertaking, which secure a delivery to the plaintiff if adjudged, it must be held, we think, that, where defendant has obtained the possession upon giving the undertaking, either party may, primarily, insist that plaintiff's judgment shall embrace a return of the property if that be possible; and, ordinarily, to accomplish the result contemplated by the statute, and to which the respective parties would be entitled, the judgment should be in the alternative in such case. It does not necessarily follow, however, that a judgment for the value alone will be erroneous or even if erroneous that it will cause a reversal. Many cases hold it sufficient to order a modification of the judgment without reversing it. (Ward v. Masterson, 10 Kan., 77; Babb v. Aldrich, 25 Pac., 558.) In Boley v. Griswold, 20 Wall., 486, it is held that a judgment is not necessarily erroneous if the alternative is not expressed on its face. It is said in the opinion: "The court must be satisfied that the de-

livery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding." In 18 Ency. Pl. & Pr., 592-594, the rule is thus nicely stated: "The purpose of the alternative judgment being to give the unsuccessful party the privilege of returning the property in satisfaction thereof with costs, it follows that such a judgment is unnecessary when the property in question is already in the possession of the successful party, when a return is not demanded, and when from special circumstances a return is manifestly impossible." And a large number of cases are cited in the note in support of the text.

In the case at bar the plaintiff is not complaining, nor could it complain, since it requested the instruction given to the effect that the plaintiff was entitled to recover the value, without mentioning a return. That might be held, we think, to constitute an election to take a money judgment only, at least where nothing to the contrary appears.

It is not disclosed that the defendant objected to the form of the judgment, nor was such an objection made in the motion for a new trial. But a conclusive answer to the objection, made here for the first time apparently, is that by the testimony of defendant it appeared that he had sold some of the cattle at different times, thereby rendering a return impossible. A useless proceeding will not be required. A judgment for a return could not possibly have been complied with, and, therefore, upon the circumstances, accepted upon the trial by both parties, a judgment for the value was sufficient. Indeed that such would be the sole result if plaintiff recovered was evidently the theory of each party as judged upon the evidence offered.

II. There is no merit in the contention that the damages assessed are excessive. The sum assessed, \$1,830, included interest from the commencement of the action, a period of two years and nine months, showing quite clearly that the

cattle were valued at thirty dollars a head. There was ample evidence, though conflicting, in support of this. Several competent witnesses as to value were produced by plaintiff, not one of whom placed the value lower than thirty dollars.

For the reasons aforesaid we fail to find any reversible error in the record. The judgment will, therefore, be affirmed.

Affirmed.

BEARD, J., and MATSON, District Judge, concur.

HON. RODERICK N. MATSON, Judge of the First Judicial District, sat in place of MR. JUSTICE SCOTT, who had announced his disqualification.

ON PETITION FOR REHEARING.

BEARD, JUSTICE.

The plaintiff in error has filed a petition for a rehearing in this case, in which it is urged that the court was in error on each and every question decided. It is contended that a chattel mortgage on co-partnership property is invalid unless the mortgage is signed by each and every member of the firm in person, and that authority to do so cannot be conferred by power of attorney. The statute requiring such mortgages to be *executed* by each member of the firm was evidently intended to limit the general agency of the members of the firm, and one of its purposes was to prohibit one member without the knowledge or consent of the others from creating specific liens upon the firm property. But we can perceive no good reason—nor has any been advanced—why such authority cannot be conferred by a proper power of attorney for that purpose as well as in at least equally important business transactions such as the encumbrance or conveyance of real estate.

It is urged with much ability and at length in counsel's brief in support of the petition for rehearing, that the record of the mortgages in this case did not constitute constructive

notice by reason of the fact that they were acknowledged before a notary who was at the time a stockholder of the corporation which was the mortgagee, and that the district court erred in refusing to permit the plaintiff in error to prove that fact on the trial. We are, and were at the time the decision in this case was handed down, aware of the conflict in the decisions upon that question. In the case before us the mortgages were valid between the parties although not acknowledged. (See paragraph 2 of the opinion.). The acknowledgments are in due form and there is nothing either upon the faces of the instruments or in the certificates of acknowledgment to indicate that the notary was a stockholder in the mortgagee corporation or had any interest in the mortgages. They were fair and regular upon their faces. They were, therefore, admissible to record for the reasons stated in the opinion, and imparted constructive notice to subsequent purchasers. In addition to the authorities cited in the opinion, see *Read v. Loan Co.*, 68 O. St., 280; *National Bank of Fredericksburg v. Conway*, 17 Fed. Cases, p. 1202, Case No 10037, and *Fair v. Bank*, 70 Kan., 612. In the Kansas case last cited it was held that "a chattel mortgage, regular upon its face, duly filed for record, and accompanied by an affidavit of renewal, filed in proper time and regular upon its face, and regular in fact except for the latent defect that the notary public who administered the oath was a stockholder in the mortgagee corporation, imparts notice as fully as if such defect did not exist." (From syllabus by the court.) It must be remembered that we are considering a question of notice only, and not whether the acknowledgments of these mortgages (assuming that the notary was a stockholder in the bank) were sufficient proof of their execution to admit them in evidence. Their execution was otherwise proved. What we held and now hold is, that the acknowledgments being fair and regular upon their faces and there being nothing on the faces of the instruments or the certificates of acknowledgment indicating any disqualification of the notary or

that he had any interest in the mortgages, they were admissible to record and that the record imparted constructive notice to subsequent purchasers.

It is urged that "the case is one of peculiar hardship, and that the long residence and undoubted character for fair dealing and commercial integrity of the plaintiff in error, as disclosed by the records in this case, surely does not stamp him as a wrong doer or trespasser. He evidently relied upon the order of the district court and the fact that the chief executive officer of the county acted at the sale." All this may be granted, but it does not change the situation. He was bound to take notice of the fact that the court making the order of sale had no jurisdiction to do so. He took his chances on the title he acquired, and that he did so knowingly appears from the bill of sale which he introduced as evidence of his title. The bill of sale is as follows: "Albany County, Wyoming, March 11th, 1903. This is to certify that for and in consideration of the sum of twelve hundred dollars to us in hand paid, we have this day sold to N. K. Boswell all our right, title and interest in and to the cattle described in a certain bill of sale, bearing even date herewith, given by Alfred Cook, sheriff of Albany County, State of Wyoming, as receiver of the property and effects of the co-partnership of Bird Brothers to us. It is understood and agreed that we in no way guarantee the title to the cattle herein mentioned.

(Signed)

"HARDEN & HARTMAN."

It is evident that the plaintiff in error understood that he was acquiring only and such right, title or interest in the cattle as Harden & Hartman acquired by virtue of their purchase from the receiver. That sale was held to be void for the reason that the court making the order of sale was without jurisdiction to order it. He took the chances; and because he was honestly mistaken as to the validity of the receiver's sale, is not a legal reason why he should be protected against these mortgages given to secure a valid indebtedness of Bird Brothers to the bank. The other points

presented by the petition for rehearing are so fully discussed in the opinion that we deem it unnecessary to enter upon a further discussion of them or to repeat what is therein stated.

The case was fully and ably presented at the hearing, both in briefs and in oral arguments, and we have again considered the questions presented by the petition for rehearing, but see no reason to depart from the decision as handed down. A rehearing is, therefore, denied.

Rehearing denied.

POTTER, C. J., and MATSON, District Judge, concur.

STATE v. PRESSLER.

APPEAL AND ERROR—EXCEPTIONS OF PROSECUTING ATTORNEY—INSTRUCTIONS—CRIMINAL LAW—HOMICIDE—SANITY OF ACCUSED—EVIDENCE—BURDEN OF PROOF.

1. Upon exceptions of the prosecuting attorney to the refusal of requested instructions in a criminal case, where the evidence is not in the record, the only question to be determined is whether the instructions should have been given under any provable state of facts in the case.
2. Upon exceptions of the prosecuting attorney to the refusal of requested instructions, where the evidence is not in the record, but it appears that the court instructed on its own motion upon the question involved, it is proper to assume that there was evidence authorizing an instruction upon the point.
3. Instructions in a homicide case to the effect that the burden is upon the defendant to overcome the legal presumption of his sanity by a preponderance of the evidence is held to have been properly refused.
4. The presumption that all men are sane and capable of understanding the nature and consequences of their acts, until the contrary is shown, is a rule of evidence applicable to criminal prosecutions, and it has the force of evidence sufficient, if uncontradicted, to establish the sanity of the

defendant. When, however, the right to a conviction is challenged by evidence tending to show defendant's insanity, the burden of proof does not shift, but still rests upon the prosecution to show that the defendant was criminally responsible.

5. An instruction in a homicide case approved to the effect that the presumption of defendant's sanity stands until overcome by the evidence coming either from the state or defense; that upon all the evidence the burden is on the state to prove beyond a reasonable doubt everything essential to constitute the crime, including the sanity of the defendant; and that if the jury, upon all the evidence, have a reasonable doubt whether the defendant was legally capable of committing the crime, it is their duty to acquit.

[Decided December 21, 1907.]

(92 Pac., 806.)

EXCEPTIONS by prosecuting attorney. From the District Court, Laramie County, HON. RODERICK N. MATSON, Judge.

On the trial of Ray H. Pressler for murder in the first degree, the prosecuting attorney excepted to the refusal of certain instructions requested by him as to the burden of proof on the question of insanity, and filed his bill showing such exceptions, pursuant to Sections 5378-5381, Revised Statutes 1899. The instructions so refused are set forth in the opinion.

W. E. Mullen, Attorney General; *Clyde M. Watts*, County and Prosecuting Attorney, and *J. E. Dyer*, Assistant County and Prosecuting Attorney, for the exceptions.

The presumption that all men are sane is well established. (Keffer v. State, 12 Wyo., 63.) It is contended for the State that where insanity is urged as a defense in a criminal case, it devolves upon the defendant to overcome the presumption of sanity by a fair preponderance of the evidence in the case. And as insanity is a general term, the proof should go to the extent of showing a degree of insanity or mental unbalance sufficient to preclude all criminal

responsibility. As the great majority of insane persons are harmless and not disposed to violence, there can be no reasonable presumption that insane persons as a class will commit crime or do violence. Therefore, the mere suggestion of facts tending to show a probability of insanity, or some mental disorder on the part of a defendant, should not create the presumption of a lack of criminal responsibility and require the State to prove the sanity and criminal responsibility of defendant beyond all reasonable doubt, where insanity is relied upon as a defense. In cases where insanity exists, the law provides a method of inquiry independent of a criminal trial, whereby the condition of a supposed insane person may be inquired into and determined by a jury. Insanity suggested for the first time on a criminal trial should be classed as an affirmative defense, to be established in the same manner as any other defense, and according to the same rules of evidence. There is no lack of adjudicated cases on the subject. The rule supported by the great weight of authority is that the burden is on a defendant to prove his insanity by a preponderance of the evidence. (*Coates v. State*, 50 Ark., 330; *State v. Redemier*, 71 Mo., 173; *Graves v. State*, 45 N. J. L., 347; *Com. v. Rogers*, 7 Metc., 500; *State v. McCoy*, 34 Mo., 531; *Kelch v. State*, 55 O. St., 146; *Ryder v. State*, 100 Ga., 528; *State v. Trout*, 74 Ia., 545; *State v. Alexander*, 30 S. C., 74; *Keener v. State*, 97 Ga., 388; *State v. Wright*, 134 Mo., 404; *State v. Bell*, 136 Mo., 120; *People v. Bell*, 49 Cal., 485; *People v. Allender*, 117 Cal., 81; *People v. Hettick*, 126 Cal., 425; *State v. Parks*, 93 Me., 208; *State v. Quigley*, 26 R. I., 263; *State v. Clark*, 34 Wash., 485; *Carr v. State*, 96 Ga., 284; *Parsons v. State*, 81 Ala., 577; *State v. Scott*, 49 La. Ann., 253; *State v. Lewis*, 20 Nev., 333; *State v. Hartley*, 22 Nev., 342; *People v. Wells* (Cal.), 78 Pac., 470; *People v. Wilson*, 49 Cal., 13; *Lide v. State*, 133 Ala., 43; *Gentz v. State*, 58 N. J. L., 482; *State v. Hunble*, 126 Ia., 462; *Brown v. Com.*, 14 Bush., 398; *Kaelin v. Com.*, 84 Ky., 354; *State v. York*, 9 Metc., 93;

State v. Duestrow, 137 Mo., 44; State v. Hanley, 34 Minn., 430; State v. Austin, 71 O. St., 317; State v. Hanson, 36 Pac., 296 (Ore.); 35 Pac., 796; Com. v. Kilpatrick, 204 Pa. St., 218; State v. Statke, 1 Strob. (S. C.), 479; State v. Coleman, 20 S. C., 441; State v. Cole, 45 Atl., 391 (Del.); Longley's Case, 99 Va., 814; State v. Stroder, 11 W. Va., 475; Casat v. State, 40 Ark., 511; People v. Donnelly, 135 Cal., 489; State v. Lawrence, 57 Me., 574.)

The question has been decided in one way or another in almost every state. The number of decisions any one way should not govern. The result most desirable is a rule based upon sound and logical reasoning supported by principles of exact and impartial justice as between the prosecution and the accused. A line of authorities hold that if a jury have a reasonable doubt as to whether the accused is sane or not, they may acquit and that while the burden rests with the defendant to introduce evidence to raise this doubt, such evidence need not preponderate, but it is ample if it is sufficient to produce a reasonable doubt. (Hopps v. People, 31 Ill., 385; State v. Bartlett, 43 N. H., 244; Polk v. State, 19 Ind., 94; Plake v. State, 121 Ind., 433; Dacey v. People, 116 Ill., 555; Hoteman v. U. S., 186 U. S., 413; German v. U. S., 120 Fed., 666; State v. People, 23 Mont., 358; Maas v. Terr., 10 Okl., 714; State v. Shuff, 9 Ida., 14; State v. Wetter (Ida.), 83 Pac., 341.) According to either rule it is well settled that the defendant must introduce some evidence in support of a defense of insanity.

T. Blake Kennedy, contra, maintained that the most logical and the fairest rule is that requiring the sanity of an accused to be established beyond a reasonable doubt, like any other element of the crime, and cited: Jones v. People, 47 Pac. (Colo.), 276; Maas v. Terr., 63 Pac. (Okla.), 960; State v. Nixon, 4 Pac. (Kan.), 159; State v. Peel, 59 Pac. (Mont.), 199; Faulkner v. Territory, 30 Pac. (N. M.), 905; Ford v. State, 73 Miss., 734; Cunningham v. State, 56 Miss., 269; State v. Bartlett, 43 N. H., 224; State v.

Pike, 49 N. H., 399; Ballard v. State, 19 Neb., 609; Knights v. State, 58 Neb., 225; Flanagan v. People, 52 N. Y., 467; Brotherton v. People, 75 N. Y., 159; O'Connell v. People, 87 N. Y., 377; Moett v. People, 85 N. Y., 373; People v. Taylor, 138 N. Y., 398; Anderson v. State, 42 Ga., 9; Polk v. State, 19 Ind., 170; Stevens v. State, 31 Ind., 485; Armstrong v. State, 27 Fla., 367; Brown v. State, 91 Tenn., 617; Hopp v. People, 31 Ill., 385; Chase v. People, 40 Ill., 352; Dacey v. People, 116 Ill., 555; Langdon v. People, 133 Ill., 382; Montag v. People, 141 Ill., 75; Hornish v. People, 142 Ill., 620; Jameson v. People, 145 Ill., 357; Lilly v. People, 148 Ill., 467; State v. Coleman, 20 S. C., 441; People v. Garbutt, 17 Mich., 9; King v. State, 9 Tex. App., 515; Revoir v. State, 82 Wis., 295; U. S. v. Faulkner, 35 Fed., 730; Davis v. U. S., 160 U. S., 469; Hotema v. U. S., 186 U. S., 413.

BEARD, JUSTICE.

This case comes to this court under the provisions of Sections 5378, 5379, 5380 and 5381, Revised Statutes of 1899, upon exceptions taken by the county and prosecuting attorney to the ruling of the district court in refusing to give to the jury certain instructions requested by the prosecution.

The facts of the case as shown by the record are, that the defendant was charged in an information filed in the district court of Laramie County by the county and prosecuting attorney with the crime of murder in the first degree. At the proper time during the trial of the case the county and prosecuting attorney requested the court to instruct the jury as follows:

"You are instructed that it is a presumption of law that all men are of sound mind; and that presumption of law sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome the presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove, to

the satisfaction of the jury, by a preponderance of the whole evidence in the case, that at the time of committing the homicide he was not of sound mind." And, "You are instructed that every man is presumed to be sane, and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, and unless insanity is established by a fair preponderance of the evidence the presumption of sanity must prevail."

The court refused to give these instructions, to which ruling exceptions were taken, and the court on its own motion instructed the jury as follows: "The law presumes the defendant to be sane; it presumes all men to be sane till the contrary is shown. This presumption of law stands until it is met and overcome by the evidence in the case. This evidence may come, of course, as well from the witnesses for the State as the witnesses for the defense; and when the evidence is all in, the jury must be satisfied, in order to convict the prisoner, not only of the doing of the acts which constitute murder, but that they proceeded from a responsible agent, one capable of committing the offense. The burden is upon the State to prove everything essential beyond a reasonable doubt, and that burden, so far as the matter of sanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts. But when the circumstances are all in on the one side and on the other, on the one side going to show the want of capacity, on the other side going to show usual intelligence, when the whole is in, the burden rests upon the State to prove the case beyond a reasonable doubt. And if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, then it is your duty to acquit the defendant."

This court being of the opinion that the question presented should be decided upon to govern in similar cases

which may be pending or which may hereafter arise in the State, allowed the bill of exceptions to be filed under the provision of Sections 5380 and 5381, *supra*.

The record brought to this court does not contain the evidence and, therefore, the only question to be determined is, whether the court should have given the instructions requested under any provable state of facts in the case. The court having on its own motion instructed upon the question, we may assume that there was evidence in the case which authorized an instruction on the point, in as much as the decision of the question cannot effect the judgment in the case, and is sought for the purpose of determining the rule of law to govern in the future and for a due and uniform administration of the criminal law.

In criminal cases where the defense of insanity is interposed, three different rules as to the burden of proof of insanity have been adopted. In a few jurisdictions the rule is that the burden rests upon the defendant to establish his insanity, at the time of the commission of acts charged, beyond reasonable doubt. This view has not met with much favor, the overwhelming weight of authority being against it. Another rule, viz.: that the burden is upon the defendant to prove insanity by a preponderance of the evidence, has been adopted by the courts of last resort in many of the states, and is the one contended for by the attorneys for the State in this case, and they have cited in their brief cases from the states of Alabama, Arkansas, California, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Rhode Island, Utah, Virginia, Washington and West Virginia. In the states of Oregon and Louisiana the matter is regulated by statute. The third rule, viz.: that the burden of proving the sanity of the defendant rests upon the prosecution and that it must do so beyond a reasonable doubt in order to convict, or, in other words, if upon all the evidence in the case the jury entertains a reasonable doubt as to the sanity of the defendant

at the time of the commission of the act, it should acquit, is the rule adopted in the states of Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New York, Tennessee and Wisconsin, and in the territories of New Mexico and Oklahoma, and also by the supreme court of the United States. We shall not attempt a review of the numerous cases on the subject, but shall content ourselves with a brief statement of some of the reasons for our conclusion.

It is not every homicide that is criminal, but only those which are committed in the manner described in the statutes prescribing punishment therefor; and the crime does not consist of acts alone, but of "acts coupled with intentions animating minds capable of reason and reflection, and comprehending the distinction between right and wrong." When the statute declares that whoever purposely and with premeditated malice kills any human being is guilty of murder in the first degree, it makes the purpose or intent to kill, the premeditation or deliberation and the malice as much essential elements of the crime as the act of killing, and each must exist and be established beyond reasonable doubt before a jury will be warranted in convicting the defendant of that degree of murder. In *People v. McCann*, 16 N. Y., 58, it is said: "It certainly is true that sanity is the normal condition of the human mind, and in dealing with acts criminal or otherwise, there can be no presumption of insanity. But it is not true, I think, upon a traverse of an indictment for murder, when the defense of insanity is interposed and the homicide admitted, that the issue is reversed and the burden shifted. The burden is still the same, and it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime; and of these the intention or *malus animus* of the prisoner is the principal. * * * It is doubtless true that, when the killing by the prisoner is established by proof, the law presumes malice, and a sufficient understanding and will

to do the act. The malicious purpose, the depravity of the heart, the sufficient understanding and will, must, however, actually exist. They are each of them as much of the essence of the crime as the act of killing. The rule which presumes their existence is a rule of evidence and nothing else, and when the law presumes their existence it recognizes and demands their presence as essential to constitute the crime. The jury must conscientiously believe they exist, or else they cannot convict. The killing of a human being by another is not necessarily murder or manslaughter. It may be either excusable or justifiable. It may have been effected under either of those conditions referred to by the elementary writers, in which the will does not join with the act, and then it is not criminal. We must be careful to distinguish between what constitutes proof, including those presumptions which the law regards as equivalent to proof in a criminal case, and what we understand by the burden of proof. By *onus probandi*, I understand, is meant the obligation imposed upon a party who alleges the existence of a fact or thing, necessary in the prosecution or defense of an action, to establish it by proof. It may be proved by the production of evidence in the usual way; or the law, under certain circumstances, in certain cases may presume its existence without proof. But it is nevertheless a part of the case of the party who alleges its existence, and to be made out beyond any reasonable doubt. Whenever it may be presumed to exist, in the absence of proof, the presumption may be repelled and overcome by evidence; and whenever the repelling proof leaves the fact to be established in doubt and uncertainty, the party making the allegation is the sufferer, and not his adversary. Sound memory and discretion at the time of the killing is oftentimes the only material question upon the trial of an indictment for murder. They are essential elements of the crime, to be established upon the trial as a part of the case of the prosecution." That the burden of proof in a criminal case rests upon the prosecution to prove every essential element constituting

the crime charged and that this burden never shifts to the defendant, was held in *Trumbull v. Territory*, 3 Wyo., 280. The charge in that case was murder in the first degree, and the court instructed the jury as follows: "If you find the killing to have been proved, and that defendant did the killing, if the prosecution has failed to prove deliberation and premeditation beyond a reasonable doubt, the law presumes such killing to be murder in the second degree, in the absence of any further evidence. The burden then falls upon the defendant to show either that such killing was justifiable or excusable, or that it was attended by such facts as would limit such killing to the crime of manslaughter." In commenting upon that instruction, Corn, J., said: "The subsequent part of the charge—'The burden, then, falls upon the defendant to show either that such killing was justifiable or excusable,' etc.—is in line with the idea first announced, * * * but if the defendant is presumed to be innocent until his guilt is established, and if the prosecutor must prove every material allegation of the indictment—every element of guilt—beyond a reasonable doubt, before he can ask for a conviction, how can the burden of proof upon any question ever fall upon the defendant? If the burden is ever upon him, it is the burden of proving what? His innocence of the crime charged, or his innocence of some element essential to constitute the crime charged. But unless the prosecutor established every such element beyond reasonable doubt the defendant must be acquitted. * * * The doctrine that the burden never falls upon the defendant does not arise *in favorem vitae*, or out of any pity or sympathy for the prisoner, but it arises out of the nature of what the sovereign power voluntarily undertakes to do before it will ask a conviction for crime at the hands of a jury."

The plea of "not guilty" in a criminal action puts in issue every material allegation of the indictment or information, and like a general denial in a civil action, casts the burden of establishing the facts necessary to convict upon the pros-

ecution. The apparent—more than real—difference in the rules, we think, arises from a confusion of the rule in civil and in criminal cases. In the former, under a general denial, the plaintiff will recover unless his evidence is met and overcome by evidence of equal or greater weight; and if the jury believes from a consideration of all of the evidence in the case that the preponderance, however slight, is in favor of the plaintiff he will be entitled to a verdict. But in criminal cases, in order to convict, the prosecution is required to prove every material allegation of the indictment or information—every essential element of the crime charged—not only by a preponderance of the evidence, but to the satisfaction of the jury beyond a reasonable doubt. And if upon consideration of all of the evidence in the case there exists in the mind of the jury a reasonable doubt as to the existence of any one or more of those essential elements which must be proven to render the act criminal, the defendant is entitled to the benefit of that doubt and should be acquitted. For instance, where the charge is murder in the first degree and the killing is admitted or clearly proven, the burden still rests upon the prosecution to prove that such killing was done purposely and with premeditated malice, and a failure to establish either beyond reasonable doubt will entitle the defendant to an acquittal of that degree of crime. In order to prove that the homicide was committed purposely and with premeditation, it must necessarily appear that the defendant was mentally capable of forming a purpose and of deliberation. And it is in such a case that the rule of law that all men are presumed to be sane and capable of understanding the nature and consequences of their acts, until the contrary is shown, applies. It is a rule of evidence, and as sanity is the normal condition of the human mind, that condition is presumed, in the first instance, to exist and has the force of evidence sufficient, if uncontradicted, to establish the sanity of the defendant. That is it makes a *prima facie* case and nothing more, and when the right to a conviction is challenged by evidence in the case tending to

show the insanity of the defendant at the time of the homicide, the burden does not shift, but still rests with the prosecution to show that the defendant was criminally responsible. That seems to be the most reasonable rule and it is well stated by the author of the article on Insanity in 16 Ency. Law (2d Ed.), 617, as follows: "The rule, however, which seems to be best supported by reason and perhaps by authority, and which is certainly growing in favor, is that the presumption that all men are sane until evidence of the contrary appears has filled its mission when it has relieved the prosecution of the necessity of proving the prisoner's sanity in the first instance; and if in the progress of the trial, proof is adduced by either side tending to show the insanity of the accused, it then devolves on the prosecution to prove beyond a reasonable doubt every element of the crime, including the sanity of the prisoner, because the legal presumption of his innocence ought to shield him from punishment unless it is clearly shown that he possessed sufficient reason to form a guilty intent." It is difficult to understand how a juror could say that he was satisfied beyond a reasonable doubt that an act was committed purposely and with premeditated malice when at the same time there existed in his mind a reasonable doubt as to the ability of the one charged to either form a purpose or to deliberate upon an act he was about to commit. We are of the opinion that the instructions requested by the county and prosecuting attorney were properly refused and that the instruction as given by the court quite clearly and fairly presented the law of the case on that point to the jury.

POTTER, C. J., and SCOTT, J., concur.

GREENAWALT ET AL. v. NATRONA IMPROVEMENT COMPANY.

APPEAL AND ERROR—NUMBERING PAGES OF RECORD—PARTIES—JOINT PETITION IN ERROR—JOINT ASSIGNMENTS OF ERROR.

1. The failure to properly arrange and number the pages of the record is not ground for dismissal until after the non-compliance with an order of court requiring re-arrangement or numbering.
2. An order sustaining a demurrer to the petition of an intervenor, the petition having been filed by permission of the court, is not a judgment or final order from which an appeal will lie.
3. A joint assignment of error not good as to all joining therein cannot be sustained as to any of them.
4. A party's individual rights may be preserved upon a several or joint assignment of error, but, if the error be jointly assigned, the relief, if any, is also joint, and, if each party so joining is not entitled to the relief, the assignment must be overruled.
5. Errors jointly assigned in a joint petition in error complaining of a judgment against one of such joint parties only cannot be sustained as to any of the parties.
6. A judgment against the plaintiff alone was complained of by a petition in error filed by him jointly with an intervenor, to whose petition, filed by the court's permission, a demurrer had been sustained, but against whom no judgment had been rendered; and the errors were jointly assigned. *Held*, that since there was no right of appeal in the intervenor, and the assignments of error were joint, the judgment must be affirmed.

[Decided December 28, 1907.]

(92 Pac., 1008.)

ERROR to the District Court, Natrona County, Hon. CHARLES E. CARPENTER, Judge.

The facts are stated in the opinion.

Alex. T. Butler, for plaintiff in error.

The court erroneously quashed the summons upon Earnest, since it complied with the statute requirements,

and his appearance was general. (*Honeycutt v. Nyquist*, 12 Wyo., 183.) Actions for money judgment and foreclosure of lien may be joined. (2 Yapple's Code Pl., 1102.) Without a showing, a default cannot be set aside. (*Myer v. Kelly*, 47 Pac., 1063.) A joint judgment may be entered against defendants served and in default, though other defendants are not served. (9 Pac., 727; *Lyon v. Page*, 21 Mo., 104; *Bank v. Field*, 19 Wend., 643; *Butler v. Stump*, 7 Ky., 387.) Money due on a stock subscription is due on a contract. (*Norris v. Wrenchall*, 34 Md., 492; 27 Pac., 1031.)

Any person may intervene, when his interest requires it, prior to final decree. (*Snodgrass v. Holland*, 6 Colo., 596.) In a suit by a contractor against the owner to enforce a mechanics' lien, a sub-contractor may intervene. (*Pool v. Sanford*, 52 Tex., 621.) All persons whose liens are filed as the statute provides, upon application to come in at any time before final judgment, and, by an answer in the nature of a cross petition, may set forth his claim and ask to have the same foreclosed. (*Johnson v. Keeler*, 46 Kan., 304.)

The court should have given a judgment following the prayer of the petition. The defendant by his default admits the justice of the claim, and thus consents that judgment be taken against him for what is prayed for in the petition. (*Lowe v. Turner*, 1 Ida., 107; *Burlin v. Goodman*, 1 Nev., 314; *Lamping v. Hyatt*, 27 Cal., 99.)

The judgment rendered for the defendant is contrary to law, in that plaintiff in error, Greenawalt, had a duly filed lien, a verified petition, and duly filed reply. There was not sufficient facts before the court to support a judgment for the defendant. Default may be entered for value of services rendered. (*Whereatt v. Ellis* (Wis.), 30 N. W., 520.)

E. D. Norton, for defendants in error.

The summons against Earnest was properly quashed, as he was not named as defendant in the petition. A stock-

holder is not liable for the debts of a corporation until the liability of the corporation has been established. Exhibits are not to be considered as a part of the pleading to which they are attached. A perusal of the petition of the intervenor conclusively shows that it does not state a cause of action against the defendants. The action of plaintiff is for the foreclosure of a mechanics' lien founded on a written contract, to which the intervenor is not a party, nor does the record disclose that he ever filed a lien as subcontractor. The said petition for intervention simply discloses the fact that the intervenor has a cause of action or grievance against the plaintiff solely, and not against the defendants.

SCOTT, JUSTICE.

This action was commenced in the district court of Natrona County by Greenawalt, one of the plaintiffs in error, as plaintiff, against the Natrona Improvement Company et al., defendants in error, as defendants, to foreclose a mechanics' lien. After the amended petition, answer and reply had been filed, Huffman was permitted to file his petition of intervention. Thereafter a demurrer to Huffman's petition was filed, argued and submitted, and the court sustained the demurrer, to which ruling Huffman excepted; and no further or amended pleading was filed by him nor was the ruling upon the demurrer followed by any judgment against him. At the time set the case was regularly called for trial and upon motion the court gave judgment for the defendants and against Greenawalt upon the pleadings. Greenawalt and Huffman bring error.

1. The defendants in error have filed a motion to dismiss the proceedings in error on the grounds, first, that the pages of the record have not been numbered in accordance with the requirements of the rules of this court; and, second, that the statement of the points and authorities relied upon in plaintiffs in error's brief does not refer specifically to the page and portion of the record where the question under discussion arises.

This court has held that a failure to comply with these rules is not ground for dismissal in the first instance. (*Harden v. Card*, 14 Wyo., 479 (85 Pac., 246.)) In that case it is said: "The rules provide that the court may, of its own motion, or upon motion of the defendant in error, enter an order requiring that the papers be properly arranged, or the pages numbered within a specified time, and that for a failure to comply with such order the cause may be dismissed in the discretion of the court." No such order has been made in this case, and it necessarily follows that the motion must be and is hereby denied.

2. Both Greenawalt and Huffman are designated in the title of the petition in error as plaintiffs in error. The petition was filed in this court on April 6, 1907. Its opening words are, "Plaintiffs in error say that at the January, 1907, term of the district court, Second judicial district, in and for Natrona County, the State of Wyoming, on the 26th day of February, A. D. 1907, being one of the regular days of said January, 1907, term of said district court, said defendants in error recovered a judgment by the consideration of said court, against said plaintiffs in error, in an action wherein J. L. P. Greenawalt and A. S. Huffman were plaintiffs and the Natrona Improvement Company and Boney Earnest et al. were defendants, a transcript of the docket, and journal entries whereof, is filed herewith, as made and provided by the statute in such case.

"The said plaintiffs in error claim that there is manifest error in the records and proceedings of said court filed herewith and made a part hereof, to-wit:" and then follows the various assignments of error. Neither in the title nor body of the judgment does Huffman's name appear. The judgment complained of is against Greenawalt alone and in favor of the defendants, and Huffman is not a party thereto. The petition in error and the assignments of error are joint, and prosecuted and made jointly by Greenawalt and Huffman, and the prayer is for joint relief.

Huffman's appearance in the case was as intervenor, and his right to be heard must on the record be based solely on

the order of the court sustaining the demurrer to his petition. Such an order is neither a judgment nor a final order within the provisions of our statute from which an appeal will lie, and it has been so held by this court in *Menardi v. O'Malley*, 3 Wyo., 327, and *Turner v. Hamilton*, 10 Wyo., 177. Had he filed a separate petition in error and served his assignments he would, under these decisions, have had no standing in this court and his petition would in such case have to be dismissed. Greenawalt having joined with Huffman in prosecuting joint assignments of error, the question is presented as to whether the assignments so made entitle him to have them reviewed in this court. With reference to a joint motion for a new trial this court announced the rule in *North Platte Milling Co. v. Price*, 4 Wyo., 293-306, as follows: "The motion for a new trial is a joint motion of both plaintiffs in error. It is clear that the overruling of the motion was right as to the North Platte Milling and Elevator Company * * *. Whatever the law might be as to the Wyoming National Bank on a separate motion for a new trial, the joint motion was properly overruled." In *Hogan v. Peterson*, 8 Wyo., 549-564, this court said: "It is difficult to comprehend upon what theory any verdict was rendered against Hogan and Chandler. * * * Had they presented a separate motion for a new trial, they would have been entitled to the vacation of the judgment against them. * * * For the reasons above set forth Mr. Fourt (one of the defendants) was not entitled to a new trial. The motion for a new trial being properly overruled as to him, and the motion being a joint one of all the plaintiffs in error, it must be held to have been properly overruled as to the others also." This rule applies with like force and effect to a joint assignment of error. In *Gordon v. Little*, 41 Neb., 250 (59 N. W., 783), the court say: "A joint assignment of error not good as to all who joined therein will be held bad as to all." That court said in *Curtis v. Osborne*, 60 Neb., 708 (89 N. W., 420): "Halsted and his grantee, Curtis, have joined

in the prosecution of a petition in error. Halsted is not in a position to claim error only on the theory that the judgment effects some of his substantial rights as a mortgagee or as a purchaser at the judicial sale made in the foreclosure proceedings. As we have seen, he is not in a position to complain, having purchased the property subject to the judgment lien; and it thus appearing that the record is without error as to him, the petition in error cannot be sustained as to both plaintiffs and, therefore, must be overruled as to both." As already stated, no judgment was rendered against Huffman on the demurrer and there was nothing from which he could appeal. In *Board of Commissioners v. Fraser*, 19 Ind. App., 520 (49 N. E., 42), the appellate court of Indiana say: "The demurrer of Smith having been sustained, and judgment rendered against the board of commissioners alone, Smith was not harmed by the action of the court. There is no error of which he could complain or from which he could appeal. The assignments being joint, and not being good as to one of the appellants, must fail as to all." It is said at page 1003 in 2 Cyc., that, "It is an elementary and well settled rule that joint assignments of error must be good as to all who join therein or they will not be available as to any of them. If the assignment of error is not good as to one, it will be overruled as to all. This doctrine has been applied in a host of decisions and under widely varying circumstances." Many cases showing when, how and under what circumstances the question has arisen are cited in support of the text, among which are the following: *Davis v. Williams*, 121 Ala., 542 (25 So., 704); *Brachtendorf v. Kehm*, 72 Ill. App., 228; *Advance Mfg. Co. v. Auch*, 25 Ind. App., 687 (58 N. E., 1062); *Sparklin v. St. James Church*, 119 Ind., 535 (22 N. E., 8); *Moseman v. State*, 59 Neb., 629 (81 N. W., 853); *Kittel v. Callahan*, 19 N. Y. Suppl., 397 (46 N. Y. St., 404). See 3 Cent. Dig., tit. "Appeal and Error," 2985, *et seq.*; also 2 Ency. Pl. & Pr., 933, and cases cited in the foot notes. The rule rests upon

the principle that it would be manifestly unjust to disturb the rights of some of the parties which have been correctly determined, on the application of one whose rights are separate, distinct and severable therefrom. A party's individual rights may be preserved upon a several or upon a joint assignment of error, but if the error be jointly assigned the relief, if any, is also joint, and if each party joining in the assignment is not entitled to the relief the assignment will be overruled.

As we have seen, Huffman could not successfully predicate error upon the ruling of the court alone in sustaining the demurrer to his petition, and Greenawalt having cast in his lot with Huffman, the petition in error cannot be sustained as to both plaintiffs in error.

It follows that the judgment must be, and it is hereby, affirmed.

Affirmed.

POTTER, C. J., and BEARD, J., concur.

BYERS v. SOLIER, SUPERINTENDENT OF THE STATE HOSPITAL FOR THE INSANE.

INSANE ASYLUM—POWER OF OFFICERS TO DISCHARGE PATIENTS—
HABEAS CORPUS—ON BEHALF OF ONE CLAIMED TO BE INSANE—
JURISDICTION—EFFECT OF DISCHARGE FROM ASYLUM—RECOMMIT-
MENT—NECESSITY FOR JUDICIAL INQUIRY—CONSTITUTIONAL LAW.

1. With the approval, or under the direction of the state board of charities and reform, in whom is vested by statute general supervision and control of the state hospital for the insane, the proper officers of that institution have the power to discharge a recovered patient.
2. A person unlawfully restrained of his liberty as an insane person is entitled to a writ of habeas corpus upon proper application.
3. The courts and judges thereof are not divested of their jurisdiction in habeas corpus by Sections 4894 and 4895,

Revised Statutes 1899, which provide a proceeding in the court of original commitment for a hearing before a jury as to whether one previously declared to be of unsound mind has recovered.

4. In the absence of a statute to the contrary, the controlling authorities of the state hospital for the insane have the power to voluntarily release one committed thereto upon his recovery; and, in the exercise of a reasonable discretion and acting in good faith, whenever the circumstances are deemed to justify it, to release a patient not fully recovered, either unconditionally, or temporarily and upon expressed conditions.
5. Where at the solicitation of his mother, the plaintiff, then a committed patient in the state hospital for the insane, was delivered into her custody by the superintendent of the institution, with the approval of the state board of charities and reform, and taken to her residence in another state, and an entry was made in the hospital records that plaintiff had been discharged as improved. *Held*, that the discharge was unconditional.
6. After the unconditional discharge of a committed patient from the state hospital for the insane, by the proper officers thereof, he cannot be again legally restrained therein, against his consent, without another judicial inquiry to determine his mental condition.
7. A person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty.
8. The authorities of the state hospital for the insane are not vested with authority to commit a person thereto, nor to confine him there against his consent, without the judicial inquiry provided by law, except one so violently or dangerously insane as to warrant his temporary confinement until the necessary proceedings can be had.

[Decided December 28, 1907.]

(93 Pac., 59.)

ORIGINAL proceedings on habeas corpus.

The facts are stated in the opinion.

R. S. Spence, for plaintiff.

The writ of habeas corpus may be refused to no one who shows a *prima facie* right to discharge. The statutory pro-

ceedings (Secs. 4894, 4895) has but one office—that of restoration to capacity. Restoration to liberty is not mentioned in the sections. Where habeas corpus is an appropriate remedy, it matters not that a remedy also exists by some other proceeding. (*Miskimmins v. Shaver*, 8 Wyo., 392.) The petition makes out a *prima facie* case. Statutes respecting habeas corpus are entitled to a liberal construction. (*In re Dowling* (Ida.), 47 Pac., 871; *Simmons v. Coal Co.*, 117 Ga., 305.)

The discharge of plaintiff from the asylum terminated the office and effect of the previous commitment, and his present confinement is without legal authority. His mental condition is not such as to require his restraint.

W. E. Mullen, Attorney General, for the respondent.

If the committing court acted within its legitimate province and in a lawful manner, its action cannot be questioned by habeas corpus. (Sec. 5498, R. S. 1899; *Miskimmins v. Shaver*, Sheriff, 8 Wyo., 392; *Younger v. Hehn*, 13 Wyo., 297.)

The question presented by this application is, whether this court may, in a habeas corpus proceeding, inquire into and determine the present mental condition of an insane patient regularly and legally adjudged insane and committed to the Wyoming hospital for the insane in the first instance. The scope of the remedy by habeas corpus as defined in the adjudicated cases more especially in cases brought for the release of insane or supposed insane persons is influenced in a marked degree by statutory and constitutional provisions existing in the different states. Generally it is perhaps safe to say, that where no special proceeding is provided by statute for the investigation and determination of cases, where persons are restrained on account of mental unsoundness pursuant to court orders, regularly and properly made or otherwise, or in cases where it is alleged that persons who were properly committed to public institutions in the first instance, have subsequently been restored to their right

mind, the remedy of habeas corpus will lie. But the only question in case of a commitment is the jurisdiction of the committing court. (Church Hab. Corp., 382; Kellogg v. Cochran, 87 Cal., 192; *In re Breese*, 82 Ia., 573; *In re Latta*, 43 Kan., 543; *In re Blewitt*, 138 N. Y., 148; 8 N. J. Eq., 533; Cochran v. Amsden, 104 Ind., 282; Gillespie v. Thompson, 7 Ind., 353.)

The necessity for the writ is not apparent. There is no apparent reason, nor any alleged, why the superintendent of the insane asylum should refuse to discharge any patient that has recovered. The records of the institution will show that recovered patients have been released in numerous instances. Again, in any proceeding brought to inquire into the mental condition of a patient confined at the asylum, the testimony and recommendation of the superintendent must of necessity be accorded great weight, by reason of his professional skill, and his facilities for observing any particular case confined for a period at the asylum. It should also be remembered that few persons confined in institutions of that kind will admit that there is any necessity for their confinement. The law recognizes not only the rights of the person confined for treatment, but also the rights of society. (King v. McClain, 26 L. R. A., 795 (63 Fed., 331.) Section 4894 is a part of the general procedure prescribed for the protection, care and detention of insane persons. It affords a method of inquiring into cases where the disability has been removed by recovery. It is the apparent theory of the statute that a judgment of commitment for insanity is not regarded as final, but, on the contrary, is one in which further proceedings may be had at any time, when it is shown by a verified petition that the person so committed has recovered and has been restored to his right mind. (Ayers v. Mussetter, 46 Ill., 472.)

The application in the present case shows that Byers was properly committed in the first instance, but it is alleged that he has since recovered. Here is a question of fact

which under the statute must be inquired into by a jury and there is apparently good reason for it. It does not appear that a guardian has been appointed to represent him; at any rate the petition here filed is not presented by a guardian. How is this court to know whether Byers is a competent party to an action of this character? Our statute provides that the action of an insane person must be brought by his guardian. (Sec. 3472, R. S. 1899.) If he is insane he should appear by guardian; if not insane, he should have his adjudged disability removed in the manner prescribed by Section 4894, as the committing court still retains jurisdiction of the case, and authority to inquire into and determine whether any proceeding by petition for his release is instituted in his interest, before submitting the question to a jury.

POTTER, CHIEF JUSTICE.

In this case a petition for habeas corpus was presented to the chief justice by E. T. Payton for and on behalf of the plaintiff, Ed Byers, alleged to be unlawfully restrained of his liberty at the state hospital for the insane at Evans-ton, in this state, by Dr. C. H. Solier, the superintendent of that institution. A similar application having been denied by District Judge Craig, within whose district the said hospital is located, for reasons presently to be stated, the petition here presented was referred by the chief justice to the court, and a preliminary hearing was had upon the question of the right to the writ or the propriety of issuing the same, in view of certain provisions of our statute, upon which the decision of Judge Craig, denying the writ, was based. Thereupon our conclusion to issue the writ as prayed for was orally announced, together with the views of the court upon the question argued at the preliminary hearing, and it was then stated that our opinion upon the question would be set out in writing upon finally disposing of the case. The writ was accordingly issued, and made returnable before this court as authorized by the constitu-

tion. (Const., Art. V, Sec. 3.) The defendant, as required by the writ, produced the body of the plaintiff before the court, and the case was heard upon the issues presented by the pleadings.

The petition alleges that the pretended cause of the restraint of said Byers is insanity or idiocy, or both; that about fourteen years ago the said Byers was legally committed to the state hospital for the insane by a competent court of Albany County, in this state, but that the said restraint is illegal for the reason that the said Byers is sane, sensible and able to attend to his own business. The answer and return of the defendant admits that the said plaintiff was duly and properly committed to said asylum or hospital for the insane as an insane patient on or about the month of April, 1893, by the district court of Albany County; pursuant to proceedings therein had to determine plaintiff's mental condition, and alleges in substance that by reason of disease in early childhood the mental development of plaintiff became arrested; that he could not learn to read or write, notwithstanding that he attended school for several years; and that by reason of his defective condition he was in constant trouble, and was finally committed to the said asylum as aforesaid for imbecility. It is further averred in the answer that plaintiff's mental defect is chronic and incurable and that he is what is commonly known as a feeble-minded person; that he is incapable of earning his own living, caring for himself or keeping out of trouble, and that the probabilities are that he will never improve sufficiently to do so. The answer contains the following statement: "At the time of entering the asylum, plaintiff had arrived at the age of eighteen years, and after remaining therein as a patient for eight years, he was, pursuant to an urgent request and representation made by his mother to the effect that she could care for him at her home, delivered into her custody and by her taken to her home in the State of Michigan, on the fifteenth day of June, 1901. In the month of March, 1902, plaintiff was committed to

the Michigan hospital for the insane at Kalamazoo, having become insane while in his mother's custody, and on May 2, 1902, by order of the Michigan authorities, he was returned to the Wyoming hospital for the insane, where he has since remained." The defendant further alleges that as superintendent of the state hospital for the insane he has at all times since the commitment of the plaintiff thereto exercised control and restraint over him, except the period during which he was absent from the said asylum as aforesaid, and that because of plaintiff's mental condition the said control and restraint continues up to the present time. It is further alleged that it has been the policy of the said institution of which the defendant is superintendent at all times to release and discharge patients therefrom, whenever a release and discharge is warranted by a proper degree of recovery, but that it would be contrary to plaintiff's best interests in consequence of his defective mental condition to release and discharge him at this time. It is also alleged that the statutes of this state provide a plain and specific remedy for the determination of cases of this character by a trial before a jury in the court from which the commitment was issued in the first instance, whereby the disability so imposed may be removed in all proper cases.

Upon the filing of the answer and return counsel for plaintiff filed and presented a motion for judgment upon the pleadings and for the discharge of the plaintiff for the reason that upon the averments of the answer it appeared that the plaintiff is held and restrained of his liberty by the defendant without authority or due process of law. Without deciding that motion at the time it was presented it was taken under advisement with the understanding that it should be considered in the final disposition of the case. A reply was thereupon filed which is more in the nature of a demurrer, since it merely denies the sufficiency of the facts set forth in the answer to authorize plaintiff's restraint. Evidence was, however, produced and admitted on behalf of both parties with reference to plaintiff's mental condi-

tion, and his temporary absence from the asylum and the cause thereof, and the matter was taken under advisement upon the pleadings and the evidence for final determination.

1. It is contended on behalf of the defendant that when one having been lawfully committed to the state hospital for the insane claims to have been restored to his right mind, or to have recovered sufficiently to authorize his release, his remedy is not by habeas corpus, but by application for an inquiry into the facts before the court or judge before whom the proceedings were had resulting in the original commitment, pursuant to the provisions of section 4894 and 4895, Revised Statutes of 1899. And it appears that Judge Craig denied the writ upon the petition presented to him on the ground that the proceeding authorized by those sections of the statute afforded a sufficient remedy, and that the restoration to his right mind of a legally committed inmate of the insane asylum was not therefore a matter that should be determined on habeas corpus. The sections referred to read as follows:

Section 4894. "If any person shall allege in writing, verified by oath or affirmation, that any person declared to be of unsound mind has been restored to his right mind, the court or judge by which the proceedings were had shall cause the facts to be inquired into by a jury; provided, that before such matter shall be submitted to a jury it shall be the duty of the court to ascertain and determine whether the proceeding mentioned in this section is instituted and prosecuted in the interest of the person so declared to be of unsound mind; and if found not to be so instituted and prosecuted, the court shall dismiss said proceeding at the cost of the person instituting the same; but if found to be in the interest of the person declared to be of unsound mind, the said matter shall be submitted to a jury, as in this chapter provided. In ascertaining and determining the interest as aforesaid, the court shall have power to examine under oath any and all persons, including the person declared to be of unsound mind."

Section 4895. "The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, or to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease."

As previously stated, the effect of these sections in relation to the right to the writ of habeas corpus was presented and considered at the preliminary hearing, and the question is again raised by the answer and return of the defendant. Notwithstanding the statutory proceeding thus provided for, we concluded, for reasons briefly and orally announced at the time, that the writ might be issued. We will now proceed to formally explain our opinion upon that matter.

It is argued by counsel for plaintiff that the purpose and effect of the sections aforesaid is to provide a remedy only for the restoration to *capacity* of one previously declared to be of unsound mind, and that they do not relate to the release or discharge from the hospital for the insane of a person committed thereto or confined therein. It must be conceded that there is some basis for that argument in the fact that restoration to capacity, and the discharge of the guardian, if any, is the only result expressly provided for. An order releasing the party whose condition of mind is involved from the asylum, if there confined, or from any other existing restraint, is not in terms authorized; nor is there a provision for notice to the superintendent or other official of the asylum, or other person who might have the party in custody. The sections are found in the chapter of

the code of probate procedure entitled, "Guardians of Insane and Incompetent Persons, Lunatics and Drunkards," and in the original act enacted by the first state legislature, the chapter related largely to proceedings and regulations respecting the guardianship of such persons, though it contained certain sections, constituting all that we have on the subject, providing the forum and the method for determining the insanity or incompetency of any person; and the act itself repealed all former statutory provisions covering that matter. In the revision of 1899 some subsequent enactments with reference to insane or incompetent persons and their commitment to the asylum, or the Wyoming state hospital for the insane as the institution is now named by statute, have been included in the aforesaid chapter of the probate code.

It is well known that the provisions of our probate code were generally taken from the statutes of California, though there are occasional differences between the statutes of the latter state and our code upon the subject. The proceeding under the statute of California similar to the sections above referred to has been held in that state to be only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under a related section of its code of civil procedure. (*Kellogg v. Cochran* (Cal.), 25 Pac., 677; *Aldrich v. Superior Court*, 52 Pac., 148.) But in that state it seems that there are ample and definite regulations in its political code for the commitment of insane and incompetent persons to the state asylum and their discharge therefrom; and in the case first above cited it was said with reference to the proceeding similar to the one provided for by our statute above quoted, that to hold it to be applicable "to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the political code." And it was further said:

"After a person has been committed to either of the insane asylums on a charge of insanity, and received into the

asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum."

It appears that the political code of California provides expressly that insane persons received into the asylums must, upon recovery, be discharged therefrom, which is held, in the case cited, to imply power to determine whether or not the patient has recovered. And it seems also to be made the duty of the resident physician to discharge persons who may have been improperly committed. There is a further provision of their political code authorizing the kindred or friends of an inmate of an asylum to apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody, which may be issued upon their proving that they are capable and suited to take care of him. A still further provision requires the trustees to reject all other orders or applications for the release or removal of any insane person, except an order on proceedings in habeas corpus. (*Kellogg v. Cochran, supra.*)

The construction of the California statute similar to that of this state by the California court is not, therefore, based entirely, if at all, upon the language thereof, or its relative position in the general statutes or the original act containing it, but quite largely, if not altogether, upon the effect of the provisions of a separate code relating particularly to persons committed to an asylum. The sections of our statute under consideration were unquestionably suggested by the similar California statutes, and, in the main, the language of the latter is followed by our statute, yet there is some slight difference in that respect, and the statute here has been amended since its original adoption in a particular immaterial to the question now being discussed. The provisions of the political code of California referred to in

the decisions above cited have not, however, been adopted in this state, and we have no statutory provisions similar thereto or to the same effect. It is apparent, therefore, that the California decisions construing their statute corresponding to our own cannot be regarded as controlling or even persuasive authority upon the effect or application of our statute and the proceeding thereby provided for.

We do not find any express provision of our statutes authorizing the discharge of a patient committed to the insane asylum, and, except by habeas corpus, there seems to be no remedy to enforce such discharge unless afforded by the statute in question. We entertain no doubt, however, of the power as well as the duty of the proper officers of the asylum to discharge a recovered patient, at least with the approval or under the direction of the state board of charities and reform,, in whom is vested general supervision and control of that and all other charitable institutions supported by the state. (Rev. Stat. 1899, Secs. 633, 634.) It is self-evident that the object of establishing the hospital for the insane was not the involuntary confinement of persons of sound and healthy minds, and that such hospital is not a proper place for the restraint of a person subject to no mental infirmity. And, indeed, the board and superintendent, as appears by the answer herein, and the evidence in this case, have exercised the power of discharge from time to time, by releasing such patients as were deemed to have reached a proper degree of recovery to warrant it. Nevertheless, the fact remains that there is no statute particularly regulating that matter which could affect the construction to be given the sections authorizing the proceeding, which is here suggested as a statutory remedy sufficient to justify, if not to require, the denial of the writ of habeas corpus in cases of this character.

In the California case of Kellogg v. Cochran, *supra*, an official discharge from the asylum pursuant to the statute was held to operate as a restoration to capacity of the person so discharged; and thus the proceeding provided by their

civil code would be unnecessary to obtain a restoration to capacity of one committed to an asylum, but without guardian. Whether restoration to capacity of one without a guardian would follow a discharge by an official of the asylum in this state, in the absence of express statutory authority for such discharge, is not necessarily involved in this case, for here we have merely the question of the legality of the plaintiff's restraint to consider and determine. But it would seem that as our statute providing the proceeding referred to contains no exceptions, and is unaffected and unqualified by other statutory provisions, one who had been committed to the asylum, though without a guardian, might invoke it to have his restoration to capacity judicially declared. Indeed, Section 4895 seems to imply that the party whose restoration to capacity is sought may be without a guardian.

Whether the proceeding may be instituted for the further purpose of procuring by judicial order a release from the insane hospital or from any other restraint is a more serious question, and we think may be subject to some doubt. We are of the opinion, however, that it is unnecessary to decide that question in this case. Our comments in relation to the matter have been for the purpose of suggesting to those interested the unsatisfactory, if not doubtful, condition of our statutes regarding the remedy for the discharge upon recovery of one committed to the hospital for the insane, since it is a subject that can be and clearly ought to be regulated by legislative enactment, within reasonable and constitutional restrictions.

If it should be conceded that the legality of the confinement of a party in the asylum, whose sanity or soundness of mind is alleged, may be determined in the aforesaid statutory proceeding, and his release enforced thereby, we are of the opinion, nevertheless, that the courts and the judges thereof are not divested by the statute of their jurisdiction conferred by the constitution to issue writs of habeas corpus on petition by or on behalf of any person in actual custody.

(Const., Art. V, Secs. 3, 10.) Moreover, we observe nothing in the statute in question to indicate a legislative attempt to interfere with that jurisdiction. If the statute had clearly authorized an order for a party's release from custody by the proceeding provided for, it might, perhaps, have afforded a sufficient reason for requiring a resort to it before the issuance of a writ of habeas corpus; though in such event we are satisfied that the power would exist to issue the writ and determine the legality of the restraint without compelling a resort in the first instance to the statutory proceeding. But as there is some doubt as to the effect of the statute, and we have no doubt of the jurisdiction in habeas corpus, we were and are of the opinion that the writ ought to be issued upon the petition filed herein and the legality of the restraint of plaintiff determined thereon. That a person unlawfully restrained of his liberty as an insane person is entitled to a writ of habeas corpus upon proper application, as well as a person illegally confined upon any other ground or excuse, is not, we think, open to question. (16 Am. & Eng. Ency. L. (2d Ed.), 598.) In a Michigan case this principle was forcefully stated as follows: "The writ of habeas corpus penetrates the walls of insane asylums as fully and freely as any other place where persons are illegally restrained of their liberty." (Palmer v. Circuit Judge, 83 Mich., 528.)

2. In our statement of the case the averment of the answer is quoted which relates to the release of the plaintiff from the asylum at his mother's request in June, 1901, and his again becoming an inmate thereof in May, 1902. It appears from the evidence respecting that circumstance that at the solicitation of the mother, the defendant, as superintendent of the asylum, with the approval of the board of charities and reform, caused the plaintiff to be delivered into her custody, and he was taken to Michigan, where the mother then resided, and an entry was made in the records of the institution to the effect that he had been discharged as improved. Within a short time after his commitment to

the Michigan institution for the insane, the authorities of that state, having learned of his previous confinement in the asylum here, contended that he was a proper charge of this state, and insisted that he be received and taken care of by this state; whereupon, by the consent or order of the board of charities and reform, he was brought back and again placed in the hospital for the insane at Evanston, where he has since been restrained, without further commitment or further proceedings in this state to determine his mental condition.

The motion for the discharge of plaintiff upon the pleadings was based upon the allegation of the answer showing such release, and plaintiff's subsequent confinement without a new judicial inquiry; and the point suggested by the motion is also raised upon the evidence. So that, irrespective of the question whether the condition of plaintiff's mind is such as to constitute him a proper subject for restraint in a hospital for the insane, the sufficiency of the proceedings to authorize his present restraint is presented upon the above facts.

The statute is somewhat indefinite respecting the commitment and discharge of insane persons or those affected with mental unsoundness, who are not accused or convicted of any offense against the criminal laws, and that is particularly noticeable as to the form and terms of the commitment, or the order therefor, and the authority to discharge one from custody who may have been committed to the hospital for the insane, as well as the condition or occasion which will authorize or require such a discharge. It is provided that the determination of the insanity or incompetency of any person shall be by a jury of six men before the district court, or, in vacation, before the judge, or the court commissioner or clerk of court. (Rev. Stat. 1899, Sec. 4879-4883.) And the clerk is required to furnish the person to whom he issues the warrant a certified copy of the verdict and the physician's lunacy statement (which statement is required by Section 4884), and the person to

whom the warrant is issued is required to deliver such certified copies with the commitment warrant to the superintendent of the hospital at the time of commitment. (*Id.*, Sec. 4886.)

Whenever a person is adjudged insane and ordered by the proper court to be committed to the hospital for the insane, the clerk of court is required to notify the superintendent of the hospital of such proceedings; and thereupon the superintendent is required, under such rules as shall have been provided by the state board, to conduct or cause to be conducted the person so declared to be insane to the hospital for the insane. (*Id.*, Secs. 650-652.)

A section of the Revised Statutes of 1887 (Sec. 3765) is not brought into the revision of 1899, but is probably in force, as to its continuing provisions which have not been abrogated or repealed, by virtue of Section 2714, Revised Statutes of 1899, which provides that "all acts or statutes in relation to public institutions of the state" in force at the time of the act providing for the last named revision shall continue in force, or expire, according to their respective provisions or limitations, and shall not be construed as repealed by anything in the said revision contained, or the act providing therefor. Said section of the Revised Statutes of 1887 is found in the chapter devoted to the insane asylum—now the hospital for the insane—and provided for notice to the commissioners of the various counties of the completion and readiness for use of the asylum building whenever that should occur; whereupon it was further provided that after the receipt of such notice, each board of county commissioners should cause all persons adjudged to be insane, and whose care shall have been thrown upon the county, to be sent as patients of the territory (state) to the insane asylum at Evanston, to be kept and cared for by the territory (state).

That a discharge from the asylum or hospital upon discovery of the mental soundness of a patient or the recovery of one committed to it was contemplated by the legislature

is evident from the provisions of Section 4888, Revised Statutes of 1899, which was enacted in 1897, imposing the duty upon the state to pay all expenses of returning recovered patients, and patients found not to be insane, to their respective homes or the county from which they were committed. But there seems to be no provision of the statutes expressly authorizing or requiring a discharge by the asylum authorities.

Manifestly an original judicial inquiry under the statute into a person's mental condition has reference to the condition of the person at the time of the hearing, and a verdict of insanity or incompetency will be based upon such condition at that time. In other words, if it be so found, the person is then declared to be of unsound mind, and as such the commitment to custody follows. But the hearing, verdict, order and commitment will not necessarily adjudicate the condition of the party for all time. It is evident that in many cases recovery may occur. It would seem, therefore, that the commitment should require the restraint of the party only during the period that the insanity, unsoundness of mind, or incompetency shall continue, or until he shall be lawfully released.

In the absence of a statute making positive regulations for a voluntary discharge, must a patient once committed to the asylum be retained there until released upon habeas corpus, or by some other authorized judicial proceeding by which a release may be enforced; or, without a judicial investigation, may the officers in charge of the institution discharge one committed to it when they are able to determine that a proper degree of recovery has occurred to justify it, or upon the happening of any condition rendering the discharge in their judgment advisable? We are of the opinion that, in the absence of a statute making contrary regulations or restrictions or expressly or impliedly vesting exclusive authority in the premises elsewhere, the controlling authorities of the institution, to carry out the obvious purpose of its establishment, must be held to possess the power

to voluntarily release a committed party upon his recovery; or, in the exercise of a reasonable discretion and acting in good faith, whenever the circumstances are deemed proper to justify such a course, to release a patient who may not have fully recovered, either unconditionally or temporarily and upon expressed conditions. That the state board and the superintendent have found the exercise of such power to be necessary, in the present state of our statutes, is shown by the averments of the answer in this case. If that should be deemed too great a power to vest in the hospital authorities without restriction, it is a matter easily remedied by legislation. It is clearly not impossible or even improbable that in occasional cases the character of the mental disorder of an inmate may be such that his care out of the institution by relatives or friends willing to assume the burden thereof will be proper without endangering the welfare of the patient or the safety of the public.

In *Rutter v. State*, 38 O. St., 496, it appeared that a patient had been committed to the state hospital for the insane, and the superintendent of the institution, believing the same for the patient's welfare, permitted her temporary removal out of the state in the charge and custody of her sister. Such action was upheld, notwithstanding that there was no statute expressly authorizing it; and the court refused a mandamus at the suit of the patient's husband to compel her restoration to the asylum. The court said that "the power of the superintendent is measured, in no small degree, in matters of that sort, by the apparent welfare of the patient." The statutes of Ohio provided that a patient might be discharged on the application of the superintendent to one of the trustees, and order of such trustee, and that there might be a discharge at the request of friends of the patient upon giving a bond if required by the superintendent conditional upon the safe keeping of the patient. The removal of the patient in the case cited was not made pursuant to either of those provisions, but in the exercise of a general discretion for the best interest of the patient. (See also *Stratham v. Blackford*, 89 Va., 771.)

Having concluded that the authorities in control of the hospital for the insane may in good faith discharge a patient committed thereto, we are next to inquire into the effect of an unconditional discharge, such as occurred in 1901 by the discharge of the plaintiff in this case. We refer to that discharge as unconditional, for we think the circumstances show it to have been such. That any condition was attached to the discharge is not disclosed by the answer or the evidence. It may have been and probably was confidently expected that the patient would be kept out of the state, or at least safely in the mother's custody, but it does not appear that the release of plaintiff was conditioned upon that being done.

In view of the matter heard and determined upon a lunacy inquisition under the statute providing therefor, and the effect of an order and commitment for the restraint of the party found upon such an inquisition to be of unsound mind or incompetent, the conclusion seems to be inevitable that the hearing and commitment will have served their purpose and ceased to be effectual after an unconditional discharge from the place of lawful restraint by competent authority. If circumstances thereafter should arise seeming to require or justify a renewal of the custody and restraint, in the interest of the person or the public, another hearing ought to be had to determine the question. Great injustice would often, if not generally, result from a different rule, even if the legal rights of the party to be personally affected were not to be considered. But a person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty.

In the case of *In re Thorpe*, 64 Vt., 398, the following facts were presented: The relator, an inmate of an asylum for the insane, was ordered discharged by two of the three supervisors of the insane upon condition that, in case it should become necessary to return him to the asylum, it might be done by a revocation of their order by one of them.

The relator was thereupon discharged from the asylum, and a few months afterward one of the two supervisors who had signed the discharge order revoked it, and an officer thereupon took the relator into custody for the purpose of returning him to the asylum. The laws of the state conferred upon the supervisors of the insane authority to discharge such incurable persons as may, in their judgment, be safely and properly cared for in the place from whence they were committed, but provided that persons so discharged should require for their recommitment to the asylum only the revocation of their discharge by the supervisors. Upon the facts and the law thus stated, it was held, in a habeas corpus proceeding brought by the relator, that the supervisors could impose only such conditions in discharging him as were authorized by the statute; that the power to revoke a discharge was not conferred upon one of their number, but upon a majority of them; that the question passed upon in discharging the relator concerned his personal liberty, and that, when a majority of the supervisors had once adjudged that he be discharged, he could not again be deprived of his liberty except in the manner pointed out in the statute. For those reasons the relator was held to be unlawfully deprived of his liberty and it was ordered that he be discharged from the custody of the officer.

In Gresh's case, 12 Pa. County Court Rep., 295, a petition in habeas corpus was presented by a brother of a party confined in the hospital for the insane, and, after a hearing, an order was made releasing him temporarily until a date therein stated, at which time he was required to again appear, and his wife and the hospital authorities were also required to then appear to show cause why there should not be a full discharge. The petition set up as a ground for release of the party in whose interest it was filed that he had been fully restored to his reason, and was not held for any criminal or supposed criminal matter. At the next hearing the evidence was somewhat conflicting as to the mental condition of the party whose liberty was sought, but

the court felt satisfied of his soundness of mind and discharged him. The following remark of the court is pertinent to the inquiry here: "If the reason, or judgment, of the relator should again fail him to such an extent as to make it a dire necessity to interpose and control him, * * * the law governing the same may be resorted to and enforced, as in other cases."

Although, in the present state of our statutes and as they existed in 1901, the asylum authorities may discharge an inmate, if that be deemed proper in their judgment, they are not vested with authority to commit a person thereto, nor to confine him there against his consent without the inquiry provided by law, except, perhaps, temporarily, in the case of one violently or dangerously insane, until the necessary proceedings can be had, to avoid the injury which might be reasonably expected to occur if the party was allowed to be at large. Generally, it is permissible, without warrant or express authority, to confine temporarily a person disposed to do mischief to himself or another person, until the proper proceedings can be instituted to have the question of his sanity determined. In such a case the restraint becomes necessary and, therefore, proper both for the safety of the party himself and for the preservation of the public peace. (16 Am. & Eng. Ency. L. (2d Ed.), 596.)

The case before us does not come within the exception above noted. The restraint complained of appears not to have been undertaken in contemplation of the statutory proceeding for a commitment, but upon the order of the board in the exercise of a supposed duty without further proceedings. The act of the board and superintendent was no doubt in good faith in renewing their custody of the plaintiff; and it may be assumed that if he was a public charge, which seems probable, the burden thereof properly rested upon this state. There is nothing in the evidence before us to show that his relatives or any friend, at the time, was interposing in his behalf, or offering to undertake the responsibility of his support, and we understand that he had

no means or estate of his own. We are of the opinion, however, that to justify his continued restraint without his consent a judicial inquiry pursuant to statute was and is required.

According to the evidence the plaintiff is not vicious; and he is not insane in the sense that he is subject to delusions. His mental development appears to have been arrested during childhood, and his condition is best expressed, as stated by the superintendent, by the term "feeble-minded." That official testified that the plaintiff is unable to take care of himself, owing to such arrested development, resulting in his lack of knowledge and inability to acquire knowledge about matters essential to his own interests if allowed to remain at large; and in the superintendent's opinion his mind is incapable of substantial improvement, though the party presenting the petition here seems to hold a contrary view.

The plaintiff was not only present, but was examined as a witness in his own behalf. So far as he possessed information he answered intelligently; but he appeared to be deficient in a knowledge of numbers and money values, and seemed to have but little comprehension thereof. He admitted that in regard to the exchange of money he would require assistance. He expressed a desire and intention, if released, to take up a homestead and cultivate it near the residence of his friend who presented his petition; and he gave evidence of some understanding respecting the elementary requirements in the cultivation of the soil. He had, it appears, before his commitment to the asylum in 1893, worked at times for others in the city of Laramie, where he then lived; and at the asylum he has been intrusted with certain daily duties, but not calling for the exercise of much, if any, independent judgment. He has had a part in cultivating a garden upon the asylum premises and raising produce for the market upon his own account, in company, however, with another, who we understand took charge of the business features of the enterprise. Plaintiff's restraint

is, therefore, not a temporary necessity so as to be authorized without a warrant or commitment.

Inasmuch as our decision is based upon the insufficiency of the proceedings to authorize the retention of the plaintiff in the hospital for the insane, and that upon such ground he has a right to demand his release, we do not think it necessary or proper to consider the question whether his condition is such as would render his commitment justifiable upon proceedings instituted pursuant to law.

The friend of the plaintiff, who has interceded in this case in the latter's behalf, has announced his willingness and desire to take charge of the plaintiff in case of his release, so far as the same may be necessary for his protection, and we assume that he will do so. There is no apparent reason, therefore, even if it would be authorized in any case to make any other order in the premises than for plaintiff's discharge. For the reasons above stated we find that the plaintiff is unlawfully deprived of his liberty, and an order will be entered discharging him from custody.

BEARD, J., and SCOTT, J., concur.

HOVEY v. SHEFFNER, SHERIFF.

HABEAS CORPUS—FUNCTIONS OF WRIT—SUPREME COURT—JURISDICTION—JURY—DISAGREEMENT—DISCHARGE—DISCHARGE ON SUNDAY—EFFECT OF IMPROPER DISCHARGE—FORMER JEOPARDY AS GROUND FOR HABEAS CORPUS.

1. A writ of habeas corpus does not possess the functions of a writ of error or other proceeding for the review and correction of errors.
2. In a habeas corpus proceeding by a prisoner pending a prosecution for a criminal offense, the court is not concerned with mere errors of law not affecting the jurisdiction of the committing court to make the order under which the petitioner is held.

3. On a habeas corpus proceeding brought by a prisoner committed for a second trial after an alleged void discharge of the jury at the former trial without a verdict, it is not material whether the discharge of the jury was a void act or not, unless it divested the court of jurisdiction to proceed further in the cause.
4. The strictly appellate or revisory jurisdiction of the supreme court is not invoked through the institution therein of an original proceeding by a petition for habeas corpus, whether the writ be allowed by the court, or a justice thereof, and made returnable before the court.
5. The occurrence of mere errors or irregularities in a criminal case not affecting the trial court's jurisdiction will not authorize a discharge of the accused on habeas corpus.
6. The jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject matter, and of the person, but as well to jurisdiction to render the particular judgment.
7. Under the general rule, as well as the provisions of the constitution and statute, a trial court may, without prejudicing a further prosecution, discharge a jury in a criminal case, where it appears that, after a reasonable time for deliberation has been allowed, a verdict has not been agreed upon, and there is no probability of an agreement.
8. The legal effect of an erroneous discharge of the jury in a criminal case without a verdict is neither greater nor less where the act is erroneous because void than where it is erroneous for any other reason.
9. Whatever the particular imperfection in the discharge without a verdict of a duly sworn jury in a criminal case, its only effect in favor of the accused is to operate as a verdict of acquittal, thereby placing the accused within the protecting clause of the constitution against a second jeopardy.
10. As a general rule the defense of former jeopardy or former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus.
11. Though an improper discharge of the jury after jeopardy begun may operate in law as an acquittal, habeas corpus will not lie on that ground for the prisoner's discharge.
12. The district court is not divested of further jurisdiction in a criminal case, or of jurisdiction to commit the accused to await another trial, so as to authorize the prisoner's release upon habeas corpus, by a discharge of the jury for disagreement on Sunday, though the act in so discharging the jury be void because occurring on a non-judicial day,

thereby giving to the accused the defense of former jeopardy or acquittal to a further prosecution.

[Decided January 20, 1908.]

(93 Pac., 305.)

ORIGINAL proceeding on habeas corpus.

The facts are stated in the opinion.

Fred D. Hammond, for the plaintiff.

At common law Sunday was *dies non juridicus*. (20 Ency. Pl. & Pr., 1190, and cases cited.) The adoption of the common law by statute (R. S. 1899, Sec. 2695) specifically excluded the common law and statutes of England, after July 4, 1776, that day being the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes in England. (Johnson v. Coal Co. (Utah), 76 Pac., 1089.) At common law courts could not perform judicial acts on Sunday, and in those states where that law prevails unrepealed by statute, the judicial acts of a court performed on Sunday are void. (Welden v. Colquist, 62 Ga., 449; Chapman v. State, 5 Blackf., 111; Taylor v. Renger, 3 Wash. Ter., 539.) Although ministerial acts on Sunday are held valid. (Hadley v. Musselman, 104 Ind., 459; Carey v. Silcox, 5 Ind., 370; Kiger v. Coats, 18 Ind., 153.)

The convening of court on Sunday and the discharge of a jury in a criminal case, because they cannot agree, is void and operates as an acquittal of the defendant. (*Ex parte Tice*, 32 Ore., 179 (49 Pac., 1038); State v. McGimcey, 80 N. C., 377 (30 Am., 90.) The discharge of a jury because of a failure to agree is a judicial act. (R. R. Co. v. U. S., 99 U. S., 700; Smith v. Strouther, 68 Cal., 194; *In re Cooper*, 22 N. Y., 67; 4 Words & Phrases, 3848.) R. S. Wyoming, 1899, Sec. 3612, providing that courts shall be always open, can, by no line of reasoning, be held to make a judicial day of Sunday, the evident intention of

the legislature being to empower courts to do official business during vacations of the court, but upon legal days. Statutes in derogation of the common law should be strictly construed. (Brown v. Barry, 3 U. S., 365.) It will be presumed that the legislature in enacting a statute did not intend to make any alteration in the common law, other than that specifically stated. (Cadwallar v. Harris, 76 Ill., 370; Hooper v. Baltimore, 12 Md., 464.) When the common law and statute differ, the common law gives way, but only when the statute is couched in negative terms, or where its matter is clearly so repugnant that it implies a negative. (State v. Norton, 23 N. J. L., 33.) The Christian religion is part of the common law. (Bloom v. Richards, 2 O. St., 387; Anderson v. N. Y., 6 N. Y. Sup., 156.) And courts should never impute to the legislature a purpose of action against religion. (Holy Trinity Church v. U. S., 143 U. S., 457.) Where a jury duly sworn is discharged without the prisoner's consent, before verdict, he is exonerated from further answering the indictment unless the record shows some legal necessity for such discharge. (Hines v. State, 24 O. St., 134; Allen v. State (Fla.), 41 So., 593; Adams v. State, 99 Ind., 244; Tomasson v. State (Tenn.), 79 S. W., 802; Obrien v. Com., 72 Ky., 333; State v. Costello (Wash.), 69 Pac., 1099.)

W. E. Mullen, Attorney General, for defendant.

It may be admitted that at common law Sunday was *dies non juridicus*. The principle, which was a part of the common law of England adopted by the colonies, is traceable to certain canons of the church. It seems, however, that prior to the fifth century the Christian courts were open to litigants and judicial business was transacted on Sunday. (Parsons v. Lindsay, 3 L. R. A., 658, and note; Hansworth v. Sullivan, 6 Mont., 203.) While the common law is expressly adopted as the rule of decision in this state the statute is qualified in terms and does not seem to require an express statutory repeal of common law prin-

(9)

ciples. If inapplicable or inconsistent with state laws, the common law rule does not apply. (R. S. 1899, Sec. 2695.) The question is governed by statutory provisions, however, in nearly all of the states, and the decisions of courts in disposing of the question follow the statutes of the jurisdiction where the respective cases are decided. Where the statutes are silent, the common law rule is held to prevail, and judicial acts of courts performed on Sunday are held to be void. A distinction is made, however, between what are classed as ministerial acts, and acts of judicial character. The Oregon case cited by counsel for plaintiff follows a statute which prohibits the transaction of judicial business by courts on Sunday, except to give instructions to the jury deliberating on their verdict; to receive the verdict of a jury, or to exercise the powers of a magistrate in a criminal action. The case cited in 80 N. C., 377, would not seem to support the contention of plaintiff in as much as that case is cited in a later case in the same state (Taylor v. Ervin, 119 N. C., 274), where it is held that under the statute of North Carolina, requiring a judgment to be entered at once on the verdict of a jury, there being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on Sunday is valid. The court also holds that in special cases, *ex necessitate*, a court may sit on Sunday. (State v. Ricketts, 74 N. C., 193.) It is probable that the question here will turn upon the interpretation of Sec. 3612, R. S. Wyo., 1899, which provides that the court shall be open at all times for certain business. The proposition advanced by counsel that courts should never impute to the legislature a purpose against religion, assumes that the discharge of a jury on Sunday is in the nature of an act against religion. We do not desire to enter upon a discussion of this phase of the question, further than to state that the cases which have discussed it have, by what appears to be the better and sounder course of reasoning, established the principle that to discharge a jury which has either arrived at a verdict, or which cannot in all probability arrive

at a verdict, is vastly more consistent with sane principles of religion, than to require a jury under such circumstances to remain confined during the entire twenty-four hours of the Sabbath day. (*State v. McGimsey, supra*; *Taylor v. Ervin, supra*; *State v. Ricketts*, 74 N. C., 193.)

The following cases show the conclusions in states where the common law as to Sunday has been confirmed or qualified in various particulars by statute: *People v. Warden*, 76 N. Y. S., 728; *State v. Straub* (Wash.), 47 Pac., 227; *State v. Rover*, 13 Nev., 23; *McCorkle v. State*, 14 Ind., 39; *Reid v. State*, 53 Ala., 402; *People v. Sato*, 65 Cal., 621; *Blaney v. State*, 74 Md., 157; *Green v. Canfield*, 38 Neb., 169; *Pearson v. Alsalfa*, 44 Fed., 358.

The phrase, "at all times," in our statute requiring district courts to be open necessarily includes Sunday. (*Adams v. Dohrman*, 63 Cal., 417; *Anderson v. Matthews*, 8 Wyo., 307; *Jones v. Bowman*, 10 Wyo., 52.)

A person is not in legal jeopardy until put upon trial before a court of competent jurisdiction, upon an information or indictment sufficient in form and substance to sustain a conviction, and a jury has been regularly charged with his deliverance. (*Cooley Const.*, line 299, and note (6th Ed.) The court cannot pass upon the question of former jeopardy on habeas corpus. It is a question to be tried by a plea in bar, from the decision of which an appeal will lie. (*Steiner v. Nerton*, 6 Wash., 23; *In re Maughn*, 6 Utah, 167; *In re Barton*, id., 264; *Church on Hab. Corp.*, 253, and note.) The attack on a judgment by habeas corpus being collateral, the judgment cannot be impeached for any error or irregularity not affecting the power of the court to act. (*Younger v. Hehn*, 12 Wyo., 289.)

POTTER, CHIEF JUSTICE.

A writ of habeas corpus was issued in this case by order of the chief justice and made returnable before the court, upon the petition of Fay Hovey alleging that she is unlawfully imprisoned and restrained of her liberty at the town

of Casper, in Natrona County, in this state, by Jesse A. Sheffner, sheriff of said county, under an order and commitment of the district court sitting in and for said county made and entered November 21, 1907, which order, by reason of certain facts set out in the petition, presently to be stated, is alleged to be insufficient to justify the imprisonment complained of. The sheriff's answer and return admits the imprisonment and restraint of plaintiff, but denies its alleged illegality, and sets out a certified copy of the order aforesaid as his authority in the premises.

It appears from the pleadings that on the 7th day of November, 1907, one of the regular days of the July term of said district court, the plaintiff was placed on trial, after a plea of not guilty, upon an information filed by the prosecuting attorney of Natrona County charging her with the statutory offense of enticing a female of good repute and chastity into a house of ill fame for the purpose of prostitution; that a jury was impaneled and sworn upon said trial, to whom, after the introduction of evidence, arguments of counsel, and instructions of the court, the cause was submitted on Saturday, November 9, 1907, and they thereupon retired to deliberate upon their verdict. That on the following day, Sunday, November 10, 1907, at the hour of ten o'clock in the forenoon, the presiding judge of said court convened the same in session, the clerk and sheriff being present, as also the plaintiff here, who was defendant in said cause, and the attorneys for the State; whereupon the jury aforesaid was called into the presence of the court, and upon inquiry by the court reported that they were unable to agree, and that there was no probability of their agreeing or rendering a verdict, and asked to be discharged from a further consideration of the case. Thereupon, on said day, they were discharged by the court; and an order was then made and entered of that date reciting the report of the jury and that "it thereupon appearing to the court that the jury cannot agree and that there is no probability of their agreeing, and that they are unable to

agree upon a verdict, and for these reasons it is ordered that the said jury be discharged from a further consideration of the case."

It further appears that thereafter, at the same term, viz.: November 21, 1907, the following order, which constitutes the authority for the imprisonment complained of, was made and entered by said court in the cause aforesaid:

(Omitting the title and caption.) "This cause coming on to be heard regularly on the special plea in bar heretofore filed by the defendant, Fay Hovey, and the same having been argued by counsel, and fully considered by the court, it is, this 21st day of November, 1907, by the court, ordered, adjudged and decreed, that the special plea in bar of the defendant, Fay Hovey, be and the same is hereby denied and overruled, to which denial and overruling of the court of said plea in bar, the defendant here and now excepts, and the court being unable to re-try said cause at this present (July term, A. D. 1907) term, it is by the court ordered, that the said cause be and the same is hereby continued until the next regular term of this court, the January, A. D. 1908, term, and it is further ordered, that the bond in this cause shall be and hereby is fixed at the sum of three hundred dollars (\$300.00) for the appearance of said defendant, Fay Hovey, before this court on the first day of the regular January, 1908, term thereof, at 10 o'clock a. m., and there to remain and not depart without leave of court and to abide the judgment and order of the court, and it is further ordered, that the sheriff of Natrona County, Wyoming, be and he is hereby commanded to receive and safely keep the said Fay Hovey and her, the said Fay Hovey, to safely keep and imprison in the jail of said Natrona County until she, the said Fay Hovey, be discharged by due process of law, and a certified copy of this order shall be the authority of said sheriff of Natrona County. To each and every part of this order the defendant now and here excepts. Done in open court this 21st day of November, 1907."

Upon the ground that the discharge of the jury was unlawful and void, for the reason that it occurred on Sunday,

an alleged non-judicial day, and without the consent of plaintiff, or a waiver by her of any of her rights, it is alleged that it operated as an acquittal, and that as a result of the proceedings the plaintiff has been placed in jeopardy for said offense.

The defendant admits, by his answer and return, the discharge of the jury on Sunday, but denies that it was a non-judicial day, and alleges that the jury was discharged because of disagreement. He further alleges that one of the jurors, named in the answer, was not a citizen of the United States, a fact not known to the prosecuting attorney at the time of the impaneling and swearing of the jury, and which could not then have been ascertained by the exercise of ordinary diligence, for which reason it is alleged that the jury was not competent and was not regularly and legally impaneled to try the cause.

Plaintiff filed a reply admitting that the juror named was not a citizen of the United States, but alleging that such disqualification was known to this plaintiff at the time, and that, being satisfied with him as a juror, she accepted him as such and considers that she thereby waived her right to object to him. The cause has been heard by the court upon the pleadings, and certain papers offered by the defendant as evidence for the purpose of establishing his allegation as to the disqualification aforesaid of one of the jurors.

We are not advised by the record in this proceeding as to the ground or substance of the special plea in bar, which appears to have been overruled by the order committing the petitioner, or the time when it was filed. The strong inference, perhaps, may be that it was filed after the discharge of the jury, and that it was based upon the ground that such discharge was illegal and void and the proceedings, therefore, tantamount to a verdict of acquittal, entitling the accused to set up the defense of former jeopardy or acquittal to a second trial upon the information or for the same offense.

At any rate the only ground urged here for the plaintiff's discharge upon habeas corpus is that, by reason of the pro-

ceedings upon her trial, she has been once placed in jeopardy, and that a second trial would violate the provision of the state constitution that a person shall not be twice put in jeopardy for the same offense. (Const., Art. I, Sec. 11.) It is urged that at common law Sunday is *dies non juridicus*, and, though there is no local statute expressly prohibiting the sitting of the court or the transaction of judicial business on that day, that the common law in that respect is in force in this state, since, by statute, the common law of England has been adopted so far as the same is of a general nature, and not inapplicable, nor inconsistent with the laws of the state. (Rev. Stat. 1899, Sec. 2695.) It is conceded that even at common law it is competent to receive a verdict on Sunday, but it is said to have been so declared for the sole reason that such a proceeding is merely ministerial; and it is contended that the discharge of a jury for disagreement requires a judicial determination that they have deliberated a reasonable time so as to authorize a discharge, and that there is no probability of an agreement, and, therefore, as a judicial act is illegal when performed on a non-judicial day. With that proposition as a basis it is contended that the illegal discharge of the jury without a verdict operated as an acquittal of the plaintiff, and that since she cannot legally be again placed in jeopardy she is entitled to be discharged.

On the other hand, while it is conceded that at common law Sunday is a non-judicial day, it is argued that the purpose of the day is far better subserved by discharging a jury unable to agree instead of keeping them together throughout the day and until Monday morning, and that the act may well be regarded as a necessity and upheld on that ground. It is further contended that the district courts are authorized to sit on Sunday, and to discharge a jury on that day for disagreement, by virtue of the statute of 1895 (Rev. Stat. 1899, Sec. 3612), which provides that, in addition to the regular terms fixed by law, "each district court shall be open *at all times* for the transaction of business in the entry of judg-

ments, decrees, orders of course, and such other orders as have been made or granted by the district court, or any judge thereof, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact."

Counsel for plaintiff insists that the expression "at all times" in said statute has reference only to days in vacation or recess upon which a court may lawfully sit and transact judicial business, and does not necessarily include Sunday or other non-judicial days. It is argued that a clear and unequivocal statute to the contrary is required to overthrow the common law principle prohibiting the transaction of judicial business on Sunday; and that the statute aforesaid is reasonably capable of a construction not interfering with that principle.

The question thus sought to be presented is an important one. If the propositions relied on by plaintiff are sound, and should be disregarded by the district court, and the plaintiff compelled against her objection to undergo another trial, notwithstanding that she has been once in jeopardy for the same offense or that in legal effect the result of the former trial was equivalent to an acquittal, an error will be committed. And if, as we suppose, the overruled plea in bar set up the facts here alleged, the order denying it and committing the plaintiff may have been erroneous. The question here upon habeas corpus, however, is not whether error has been or may be committed by the district court, but whether, in committing the plaintiff to the custody of the sheriff to await another trial, the court has exceeded its jurisdiction. In this proceeding we are not concerned with mere errors of law not affecting the jurisdiction of the court to make the order under which the plaintiff is held, nor is it material here whether the discharge of the jury was a void act or not, unless, if held to have been illegal, it divested the court of jurisdiction to proceed further in the cause. And upon this point it is contended on behalf of defendant that the court retained jurisdiction, and that habeas corpus

is not the appropriate remedy for the determination of the question of former jeopardy.

That the writ of habeas corpus is not endowed with the functions of a writ of error or other proceeding for the review and correction of errors is an elementary rule, and has many times been asserted by this court. (*Kingen v. Kelly*, 3 Wyo., 566; *In re McDonald*, 4 Wyo., 150; *Miskimmins v. Shaver*, 8 Wyo., 408; *Fisher v. McDaniel*, 9 Wyo., 457; *Bandy v. Hehn*, 12 Wyo., 289; *Hollibaugh & Bunten v. Hehn*, 13 Wyo., 269.) Hence, authority to issue the writ and determine the legality of a particular imprisonment thereon is frequently, if not usually, conferred equally upon courts of different grades and the judges thereof, without regard to the appellate jurisdiction of such courts. In this state the power is vested concurrently in the district and supreme courts and the judges thereof; and the right to entertain an application for the writ is not made to depend upon appellate or revisory authority over the judgment, order or process by which the applicant may be restrained. The writ brings up the body of the prisoner, and the cause of his commitment, but not the record of the judicial proceeding, if any, wherein the commitment has occurred. The strictly appellate or revisory jurisdiction of this court is not invoked, therefore, through the institution of an original proceeding by a petition for habeas corpus, whether the writ be ordered issued by the court or by a justice thereof and made returnable before the court.

Neither is the writ of habeas corpus designed to interrupt the orderly administration of the criminal laws by a competent court while acting within its jurisdiction. The occurrence of mere errors or irregularities in a criminal case, not affecting the jurisdiction of the trial court, will not authorize a discharge of the accused upon habeas corpus. Jurisdictional facts only are to be considered upon this writ, whenever the restraint complained of appears to be under legal process or judicial order. A void process or a void judgment or order of a committing court is ground for the

discharge of one held upon it in this summary and collateral proceeding, not because of error merely, but for the reason that the court has acted without jurisdiction, or, having had jurisdiction, has either lost or exceeded it.

Our statute proceeds upon this principle in the provision that "it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province, and in a lawful manner." (Rev. Stat. 1899, Sec. 5498.) In the case of *In re McDonald*, *supra*, Chief Justice Groesbeck, speaking for this court, said, in referring to that statute in connection with the facts of the case, that "the court had acted within its legitimate province, for it had jurisdiction of the offense and of the person of the offender"; and a decision of the Iowa supreme court construing the words "in a lawful manner" in a similar statute was quoted from with approval. In effect the decision thus approved held that "manner" had reference to the method of acting more than to the degree of perfection or correctness in the results arrived at, so that if a court observes proper methods or means it may be said to be acting in a lawful manner, although it may err in the application of legal principles, to such an extent as to involve reversible error. But it was explained that a court would not be regarded as having acted in a lawful manner when the judgment pronounced is absolutely void, since such a judgment would have no support in law. (*Elsner v. Shirley*, 45 N. W., 393.)

This court has adopted the liberal view sustained by the later authorities that the jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject matter, and of the person, but as well to jurisdiction to render the particular judgment. (*Kingen v. Kelley*, *supra*; *Miskimmins v. Shaver*, *supra*; *Bandy v. Hehn*, *supra*.) In *Kingen v. Kelley*, it was said: "Lack of jurisdiction of the subject matter, jurisdiction of the person, or jurisdiction to render the particular judgment as-

sailed, seems to include all cases which render a judgment void or subject to collateral attack in habeas corpus." In the Miskimmins case the applicant was discharged on the ground that the act for which he had been committed as for a contempt by a magistrate holding a preliminary examination did not constitute a contempt in law, and that, therefore, the magistrate had been without jurisdiction to render the particular judgment. The applicant had been committed for a refusal to answer certain questions propounded to him as a witness, the expressed ground of his refusal having been that his answers would tend to criminate him. In Bandy's case a sentence to the penitentiary as for grand larceny upon an accepted plea of guilty of petit larceny to an information charging grand larceny was held to have been in excess of jurisdiction, and the applicant was discharged. The sentence appeared to have been based upon the fact that the records of the trial court disclosed a previous conviction of the accused of petit larceny, and, without a charge having been preferred of a second offense, or a plea of guilty thereto or a regular conviction thereof, the court, upon the bare record of such previous conviction, attempted to apply the statute authorizing the punishment prescribed for grand larceny upon a second conviction of petit larceny. There jurisdiction was found wanting to render the particular judgment. In the other cases above cited previously decided by this court questions were considered connected with the procedure of courts; and the acts complained of held, if objectionable at all, to have been mere errors or irregularities, and not void as without jurisdiction, though some of the acts were objected to on constitutional grounds. Those cases serve to illustrate the principle now under discussion, but none of them involved a state of facts similar to that presented in this case.

We are, therefore, to inquire into the legal consequences of the wrongful or illegal discharge without verdict of a trial jury impaneled and sworn in a criminal case, to ascertain whether or not the act presents a jurisdictional question,

such as would entitle the accused to discharge from further imprisonment upon habeas corpus, in the event that the proceeding in relation to the jury should be held to have been erroneous either because improper under the circumstances, or void as beyond the lawful powers of the court upon the day of its occurrence.

At this day it is unnecessary to cite authority to sustain the right of a trial court, without prejudicing a future prosecution, to discharge a jury in a criminal case, where it appears that after a reasonable time for deliberation has been allowed a verdict has not been agreed upon, and there is no probability of an agreement. In accordance with the general rule upon that subject, now well established on the ground of necessity, the constitution of this state, in the section containing the provision against a second jeopardy, provides that, "if the jury disagree, * * * the accused shall not be deemed to have been in jeopardy." The statute, moreover, provides that whenever a jury shall be discharged after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order the reasons therefor to be entered on the journal; and such discharge shall be without prejudice to the prosecution. (Rev. Stat. 1899, Sec. 5386.)

It may be conceded that the improper discharge of a jury in a criminal trial after the commencement of jeopardy will render the proceedings equivalent to a verdict of acquittal, so far as such a verdict will constitute a good defense in bar of a subsequent trial for the same offense, either upon the same or another indictment or information, and perhaps also entitle the accused to a judgment of acquittal and discharge upon the same information upon motion in the trial court. When a criminal trial has reached the stage where jeopardy has commenced, and the jury is discharged without the consent of the defendant on trial, without some recognized necessity, or reason authorized by law, it may well be held, as it generally is, since the right of the accused to a verdict at the hands of the jury has been rendered impossible

without fault on his part, through the erroneous act of the court, that he may demand that the result be regarded as an acquittal, and he will be protected by the rule forbidding a second jeopardy. And, manifestly, the same situation arises upon a discharge of the jury, though for a lawful cause, at a time or on a day when the court is without power to sit or make an order discharging them.

It does not follow, however, that the erroneous or void discharge of the jury, and the advantage thereby afforded to the accused, will deprive the court of further jurisdiction in the case, or upon another information or indictment for the same offense. It is true that the facts may furnish the accused with a good defense on the ground of former jeopardy; but whether they amount to a sufficient defense or not, either as a matter of law or fact, is to be determined in the manner provided by law, the same as any other defense. The fact that the defense is based upon an immunity granted by the constitution offers no valid objection to the court's jurisdiction to hear it, and determine upon its sufficiency; nor is the opportunity offered to pass upon the matter incorrectly a ground for denying jurisdiction.

The constitution gives an accused the right to demand the nature and cause of the accusation against him, to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses; yet, it is apparent that neither the chance that the court wherein the prosecution is pending may commit error in respect to any of those matters, or an actual erroneous ruling thereon, will usually affect the jurisdiction of the court. One of the most frequent objections in a criminal prosecution is the alleged insufficiency of the indictment or information to apprise the accused of the nature and cause of the accusation; it is not, however, generally supposed that an adverse decision upon such an objection, though erroneous, takes away further jurisdiction, unless, indeed, the act sought to be punished constitutes no crime or offense under the law. In *Ex parte Harding*, 120 U. S., 782, it was

held that a denial of the right to have compulsory process for witnesses was not a jurisdictional objection; and this is in harmony with the general run of decisions on that question. (See also *In re McKnight*, 52 Fed., 799.)

The statute clearly contemplates that the trial court has jurisdiction to entertain and determine the plea of former jeopardy. It prescribes that upon arraignment the accused may offer a plea in bar that he has before had judgment of acquittal, or been convicted or been pardoned for the same offense, to which plea the prosecutor may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and a trial of such issue to a jury, if necessary, is provided for. (Rev. Stat. 1899, Sec. 5331.)

In this case there has been no judgment of acquittal, and in such case, where the further proceedings are had upon the same information that was before the discharged jury, as well generally where the accused is held to answer upon a second trial to the same information, a formal plea in bar may, perhaps, be unnecessary, though the usual practice we think is even then for the accused to ask and be granted a right to withdraw his previous plea of not guilty and substitute the plea in bar, setting up the facts deemed to constitute former jeopardy. There is, however, authority denying the necessity of the formal plea after a disposition of one trial upon the same information or indictment under circumstances that place the accused once in jeopardy. (*People v. Taylor*, 117 Mich., 583; *State v. White* (Kan.), 80 Pac., 589.) It is so held in the cases cited upon the ground that the proceedings relied on as constituting the former jeopardy are before the court upon its own record in the case; and that upon the question being raised, the court will take cognizance of the facts so disclosed and determine their proper legal effect.

The legal effect of an erroneous discharge of the jury without a verdict is neither greater nor less where the act is erroneous because void, than where it is erroneous for any other reason, as, for example, where it occurs in the en-

forced absence of the defendant, or without allowing sufficient time for deliberation, or to accommodate the prosecution in obtaining absent testimony, if that be not permitted, or upon any ground not authorized by law. Whatever the particular imperfection in the proceeding, the only result is a condition protecting the accused against further prosecution upon the ground of former jeopardy. The most that can be said in any case as to the effect of an improper discharge of a duly sworn jury in a criminal case is that it is equivalent to a verdict of acquittal, thereby placing the accused within the protecting clause of the constitution when confronted with a further prosecution.

The order committing the plaintiff into the custody of the sheriff was made on a lawful day of the court, subsequent to the discharge of the jury. Was it made in excess of jurisdiction? The authorities are numerous upon the subject of the effect upon the jurisdiction of the court of an erroneous discharge of a jury in criminal cases and, with very few exceptions, the loss of jurisdiction is denied, as well as the right to have the resulting question of jeopardy determined upon habeas corpus. If the court has jurisdiction it is evident that it is not confined in its exercise to the rendering of a correct decision. As said in *Ex parte Bigelow*, 113 U. S., 328, in discussing the court's jurisdiction upon a claim of former jeopardy, after an alleged improper discharge of the jury pending a previous trial, "It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which the court must pass so far as it was purely a question of law, and on which the jury under the instruction of the court must pass if we can suppose any of the facts were such as required submission to the jury."

In that case several indictments against the defendant for embezzlement had been ordered by the trial court to be consolidated for the purpose of trial. A jury was thereupon

impaneled and sworn, the district attorney made a statement of his case to the jury, and the court then took a recess. Upon reconvening, the court decided that the indictments could not be well tried together, and discharged the jury from further consideration of them. The prisoner was thereafter tried against his protest before the same jury upon one of the indictments and convicted. He asked leave to file a petition for habeas corpus to obtain his discharge, upon the ground that he had been once in jeopardy with regard to all the offences charged in the several indictments. The supreme court refused the writ, basing its decision upon the proposition that the trial court had not lost its jurisdiction by the discharge of the jury, and, though error may have been committed, because of the circumstances, in permitting the prisoner to be convicted upon a second trial, it did not go to jurisdiction.

It was further said in the opinion in that case: "If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error, which may be corrected by the usual modes of correcting such errors."

In *Ex parte Ulrich*, 43 Fed., 661, it was alleged that the petitioner had been placed on trial before a state court upon an indictment charging bigamy, and that, pending the trial, after the impaneling and swearing of a jury and partial examination of witnesses, the jury was discharged against the prisoner's protest, and another trial was ordered. Thereupon a writ of habeas corpus was sued out by the prisoner in the United States district court and the

same was granted. Upon appeal to the circuit court, the order discharging the petitioner was reversed. Circuit Judge Caldwell, in the opinion, said:

"Whether the first jury was discharged without sufficient legal excuse was a mixed question of law and fact, to be determined by the court, or by the court and a jury, if the facts were disputed. It is undeniable that the court had jurisdiction to determine that issue. It was the only court that had jurisdiction to determine it in the first instance; and, if it be conceded that the court decided the question erroneously, its jurisdiction over the cause was not thereby lost or in any degree impaired, and its judgment was not void, and is not open to collateral attack."

So we find it laid down as a general rule that the defense of former jeopardy or of former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus. (21 Cyc., 305, and cases cited; 9 Ency. Pl. & Pr., 632; Church on Hab. Corp. (2d Ed.), Sec. 253, and note; 1 Bish. New Cr. Proc., Sec. 821.) In the section cited, Mr. Bishop states that a discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal; and on motion, without plea, he is entitled to be set at liberty, but that should the court refuse, habeas corpus will not lie.

One of the early cases on this subject frequently cited and approved is *Wright v. State*, 5 Ind., 290. There it appeared that the petitioner had been put on trial upon an indictment for murder; the trial progressed until a day deemed by the court to be the expiration of the term, and, as the court was satisfied the trial would not be completed on that day, it discharged the jury over the prisoner's objections, and remanded the latter to jail to await trial at the next term. His discharge from custody under the order so committing him was denied on habeas corpus, although it was held that there was former jeopardy. The court conceded the privilege of every one conceiving himself illegally detained in custody to demand the writ of habeas

corpus as a matter of right, but said that it did not follow that the court or judge before whom the cause may be brought can in all cases investigate the merits of the detention. A statute existed in Indiana to the effect that on habeas corpus the legality could not be inquired into of any judgment or process whereby the party is in custody upon a warrant issued upon an indictment or information. The court held that, as the case had not been finally disposed of, and there had not been a release of the prisoner by any judgment of the trial court, he was to be regarded as in custody under the indictment, and habeas corpus could not be employed to discharge him.

The case of *Wright v. State* has been followed upon this point in an unbroken line of decisions in Indiana, with the single exception of the case of *Maden v. Emmons*, 83 Ind., 331, and that case was expressly overruled in *Gillespie v. Rump*, 72 N. E., 138. The case of *Maden v. Emmons* was where the jury had dispersed without rendering a verdict, upon discovering after they had retired that one of their number was not a resident of the county. The case of *Gillespie v. Rump*, which was an appeal from a judgment refusing discharge on habeas corpus, disclosed the following facts: After a jury had been impaneled and sworn upon the trial of the petitioner under an indictment charging the crime of murder, the submission was set aside over the objection of the accused to permit the challenge by the prosecution of one of the jurors on the ground of relationship to one of the defendants; the challenge was made and allowed, and a new juror called and sworn, all over the protests of the defendants on trial. The latter thereupon moved their discharge on the ground of jeopardy, and, it being overruled, filed a special plea in bar, which was also overruled. The trial proceeded and resulted in a disagreement of the jury and the remanding of the prisoner for another trial. In that state of the case the writ of habeas corpus was sued out. The judgment refusing to discharge was affirmed for the reason that the question

sought to be raised could not be heard and determined on habeas corpus. The various Indiana cases are reviewed in an instructive opinion.

It is true that the Indiana cases rest largely upon the provision of their statute above referred to, which, perhaps, may be regarded as more strongly prohibitive of questioning the judgment of a competent court than our own statute. It is evident, nevertheless, that the theory of the Indiana cases is opposed to the loss of jurisdiction in the trial court after an irregular or wrongful discharge of the jury. Indeed, in *Gillespie v. Rump*, it is stated in the opinion, that the discharge of a juror and the impaneling of another in his place, even if erroneous, did not deprive the court of jurisdiction, and render the subsequent proceedings void. And it seems clear from a reading of that case that a void judgment, apparent on the record, would even under the Indiana statute be deemed ground for discharge upon habeas corpus.

Ex parte Maxwell, 11 Nev., 428, was a habeas corpus case before the supreme court of Nevada. The petitioner claimed to be entitled to his discharge because of the discharge of the jury upon his trial, after they had been out but three hours, upon the mere statement of the foreman that they were unable to agree, whereby the proceedings became equivalent to an acquittal. The court upheld the contention as to the unwarranted and illegal discharge of the jury and the effect thereof, but remanded the prisoner on the ground that the order holding him for another trial was not void, but voidable only. It was held that the right to claim former jeopardy might be waived.

A statute like that in Indiana did not exist in Nevada, but the statute of the latter state was said to extend the power of the court in habeas corpus beyond that at common law. Yet it was remarked that the writ was not intended to operate or to have the force of an appellate proceeding, and that the process or authority holding the prisoner must be absolutely void, and not merely voidable,

to justify a discharge upon the writ, where the detention is by virtue of legal process.

That a claim of former jeopardy based upon an alleged improper discharge of the jury without verdict will not be determined on habeas corpus is also maintained in Missouri. The principle was announced in an early case where the discharge occurred in the prisoner's absence, and without his consent, after the jury had been out but a few hours. (*Ex parte* Ruthven, 17 Mo., 541.) And in another case where a verdict of guilty and fixing a punishment unsatisfactory to the court was set aside by the court on its own motion, and the prisoner held for another trial. (*Ex parte* Snyder, 29 Mo. App., 256.) Though there was a statute in Missouri somewhat like the one in Indiana, it is apparent that it was not deemed to take away the right to habeas corpus where want of jurisdiction appeared; and hence the decisions above cited may be regarded as authority, we think, upon the point that the improper discharge of a trial jury does not divest the court of jurisdiction, although it may have resulted in placing the accused in jeopardy. Indeed in *State ex rel. v. Williams*, 117 Mo. App., 564, it was held that, notwithstanding a party had been in jeopardy and was entitled to be discharged on motion in the trial court, after an improper discharge of the jury pending a previous trial had occurred, yet the court retained jurisdiction, so that prohibition would not lie to restrain further proceedings. (See also *Ex parte* Bedard, 106 Mo., 616.)

In Texas, habeas corpus is held not the proper remedy to try the issue of former acquittal, but that the appropriate remedy is by special plea entered in the court wherein the indictment is pending, under which the party is imprisoned. (*Pitner v. State*, 44 Tex., 578; *Ex parte* Crofford (Tex. Cr. App.), 47 S. W., 533.) In the Crofford case the defense was raised upon an alleged discharge of the jury in the enforced absence of the accused on trial. The court said: "This is not a novel question in Texas. Since the case of *Perry v. State*, 41 Tex., 488, the decisions have

been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy."

However, in *Ex parte Davis*, 89 S. W., 978, the Texas court of criminal appeals had under consideration a case where it was contended that a verdict of not guilty rendered upon a trial of the accused in one county constituted a constitutional objection to a trial for the same offense in another county, there having been a serious question in the case as to venue. The constitution provided that "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." The court regarded this provision as distinguishing between jeopardy and a verdict of not guilty in a court of competent jurisdiction; and concluded that after a verdict of not guilty the only way to avoid a second trial, if the same is being proceeded with, is to interpose the writ of habeas corpus; and it was said that the statutes and their decisions gave the court great latitude in the issuance of such writ. The other Texas cases above cited were not referred to, and the doctrine of the case last cited evidently applies only to cases where there may have been an actual verdict of acquittal.

That no inquiry can be had on habeas corpus as to whether the prisoner was present or absent when the jury impaneled and sworn to try him upon an indictment had been discharged from further consideration of the case, or whether such discharge was proper or not, was held in *State v. The Sheriff*, 24 Minn., 87. The court said: "The fact, therefore, if it be one, that the court improperly discharged the jury in the enforced absence of the prisoner, did not dispossess the court of its jurisdiction over the cause." To the same effect, where the jury was discharged for disagreement over the objection of the accused, is the case of *Ex parte McLaughlin*, 41 Cal., 211. In *Ex parte Hartman*, 44 Cal., 32, whether an arrest of judgment upon

a verdict of a less offense under an indictment charging assault with intent to murder constituted jeopardy was held to be a question not competent for consideration in an application for habeas corpus, where the accused, after the arrest of judgment, had been remanded to await the action of the next grand jury upon the charge originally preferred.

In *Steiner v. Nerton*, 6 Wash., 23 (32 Pac., 1063), a trial jury had been discharged, the indictment quashed, and, later, an information filed upon which the accused was being held for trial. Claiming former jeopardy, he applied for discharge on habeas corpus, but the same was denied—the court saying: “If the petitioner has been before in jeopardy for the same offense, that is a proper plea in bar, to be tried by the court, and from the decision of which an appeal would lie to this court.” A like conclusion was reached in the case of *In re Allison*, 13 Colo., 525.

The principle under discussion is further illustrated by cases where the claim of former jeopardy has arisen out of circumstances other than the discharge of a trial jury. In a Colorado case the petitioner for habeas corpus was in jail awaiting trial on a charge of murder. He had been once tried and found guilty of manslaughter, and announced himself ready to receive sentence upon the verdict. The court declined to pass sentence, but, over the objection of the petitioner, ordered the verdict set aside, and a new trial had. A motion for the prisoner's discharge was then made on the ground of former jeopardy, and denied, and he was remanded to await trial. On petition for habeas corpus before the supreme court, it was held that the defense of former jeopardy could not be raised in that proceeding. It was contended by counsel that as all the facts appeared upon the record in respect to the plea, it entitled the party to be heard and to be discharged in the summary proceeding; the court recited a part of the argument and stated its conclusion as follows: “In support of this proposition they urge that in such circumstances, where the petitioner has already moved the trial court for a discharge

upon the ground now urged in support of his application, he should not be subjected to another trial, or the formality of submitting to a jury undisputed questions of fact, the force and effect of which are entirely a question of law. These matters do not change the rule with respect to questions which can be inquired into on applications of this character. It has uniformly been held by this court that in habeas corpus proceedings only jurisdictional questions can be reviewed." The court in further discussing the question, stated in substance that the trial court had not lost jurisdiction, but was authorized to hear and determine the claim of once in jeopardy, and the question whether there should be another trial, and that, though the court might decide the question erroneously, it would not be divested of jurisdiction, nor would the question be available on habeas corpus. (*In re Mahany*, 68 Pac., 235.)

In re Terrill (Kan.), 49 Pac., 158, was a case where a party claimed to have been in jeopardy through a former conviction which had been held void because the trial had occurred when the court was without power to sit. Being held to await another trial, he sought release on habeas corpus. It was held that the question of former jeopardy could not be determined on habeas corpus. To the same effect the following additional cases, where the claim was made after an alleged previous conviction or acquittal. (*State v. Sheriff*, 45 La. Ann., 316; *Com. v. Norton*, 8 S. & R., 72; *People v. Ruloff*, 3 Park. Cr., 126; *Ex parte Bennett*, 51 Ark., 215; *State v. Sistrunk*, 138 Ala., 68; *In re Bogart*, 2 Sawy., 396; *State v. White* (Kan.), 80 Pac., 589; *Miller v. Case* (Kan.), 51 Pac., 922.) The case of *State v. White*, *supra*, was not decided on habeas corpus, but the question of jurisdiction on a second trial was before the supreme court, on error, the jury having been discharged, as claimed, irregularly upon a previous trial. It was contended that, though no plea of former jeopardy had been presented, and no objection made to the second trial on that ground, the facts were in the record

and showed the second trial to have been without jurisdiction. The court, however, held otherwise, expressly stating that the district court did not lose jurisdiction; and that by not having objected to the second trial on the ground of jeopardy because of the alleged improper discharge of the jury, the objection had been waived. In the Pennsylvania case of Commonwealth ex rel. v. Norton, *supra*, the petitioners had been found not guilty on nine counts of an indictment containing sixteen counts, the verdict not referring to the remaining counts. Having been afterwards committed for trial upon the other seven counts, the prisoners sought their discharge on habeas corpus on the ground that the verdict was in effect an acquittal on the whole indictment. The court refused to discharge for the reason that the court where the indictment was pending had jurisdiction, and if an erroneous judgment should be given the remedy would be by writ of error.

Our investigation of this question has resulted in the discovery of but three cases which appear to be flatly opposed to the principle supported by the array of authorities above cited. One of them, *Ex parte Ulrich*, 42 Fed., 587, was afterwards reversed by the circuit court in the case of *In re Ulrich*, 43 Fed., 661, above referred to. Another case, *In re Bennett*, 84 Fed., 324, decided by United States District Judge De Haven, in California, holds that after the reversal of a conviction of a less offense than the one charged a sentence upon conviction of the greater offense upon the same indictment on a second trial in the same court is void in the extreme sense, as in violation of the constitutional exemption of the accused from a second jeopardy. A discharge was, however, refused in that case for the reason that there had not been an acquittal of the less offense. *Ex parte Glenn*, 111 Fed., 257, decided by District Judge Jackson, in West Virginia, holds that an accused is entitled to be discharged on habeas corpus when committed for a second trial upon an indictment, after such an improper discharge of the jury at the first trial as to render the trial

equivalent to an acquittal. The opinion in the Bennett case refers to the case of *In re Bigelow*, 113 U. S., 328, above cited, but evidently regarded it as inapplicable. The opinion in the Glenn case does not notice the Bigelow case, nor, indeed, any of the authorities laying down the same doctrine. The fact is that in the Bigelow case the second trial had occurred in the same court upon one of the same indictments involved in the former trial; so that if the proceedings of the former trial amounted to an acquittal upon all the indictments as claimed, the fact appeared upon the record of the court in relation to the indictment under which the second trial was had. It is, therefore, difficult to distinguish the Bigelow case from the Bennett and Glenn cases. That the Bigelow case continues to be regarded as authority by the supreme court upon the question thereby decided is evident from its citation and approval in two subsequent cases. (*In re Belt*, 159 U. S., 95; *Whitten v. Tomlinson*, 160 U. S., 231.) In the case last cited it was said with reference to a contention that there had been a previous disposition of the offense charged in another court, "Whatever effect it (the other proceeding) might have, if pleaded, to a subsequent indictment, affords no ground for his discharge on habeas corpus."

The supreme court of the United States, however, has had occasion to distinguish between the case of *In re Bigelow* and one where, after one conviction, the accused has been again convicted upon the same indivisible act for the same offense and sentenced upon both convictions. *In re Snow*, 120 U. S., 274. In that case *Snow* had been charged, convicted and sentenced upon three indictments in Utah charging the offense of unlawful cohabitation. The alleged unlawful cohabitation appeared to have been continuous, but it was divided by the prosecution and grand jury arbitrarily into three periods and an indictment presented covering each period. After serving the sentence upon the first conviction habeas corpus was applied for. The court held that the act throughout the entire period constituted

but one offense, and that one conviction and sentence for any part of the period exhausted the power of the court to punish for the offense. Hence, although the constitutional immunity relied upon was the exemption from second jeopardy, the precise ground of the decision was that the court had no jurisdiction to inflict a punishment in respect of more than one of the convictions. This case was followed by *In re Hans Neilsen*, 131 U. S., 176. The petitioner there had pleaded guilty to unlawful cohabitation and was sentenced to pay a fine and be imprisoned in the penitentiary. After he had suffered the penalty he was put on trial for the crime of adultery with the same woman during the same period covered by the indictment for unlawful cohabitation upon which he had been punished. He was convicted over a plea of former conviction, and again sentenced to the penitentiary. It was held that there had been a double conviction and sentence for one and the same criminal act; and that the last sentence was void as beyond the jurisdiction of the court, the first sentence having exhausted the court's power in the premises. Those cases were deemed to be in line with the leading case of *Ex parte Lange*, 18 Wall., 163.

There may be cases where a prisoner has been discharged on habeas corpus on the ground of former jeopardy, where the question of the right to the writ under the circumstances was not raised. They might be persuasive, but hardly controlling authority where the objection to the use of the writ in such cases is presented. Such a case apparently is *State v. Blevins*, 134 Ala. 213, (92 Am. St. 32.) In that case, however, upon a trial for assault and battery, the court, instead of pronouncing judgment on the charge which was tried, found that the accused was guilty of another crime, viz: assault with intent to ravish the complaining witness, and thereupon bound the accused over for his appearance to answer to the latter charge. It might well be held that the court exceeded its jurisdiction in the premises, although the opinion in the case seems to put the discharge upon the ground of former jeopardy. In view of the facts in the

case it appears to be distinguishable from the case at bar and other like cases.

The main reliance of the plaintiff is upon the Oregon case of *In re Tice*, 49 Pac., 1038, which, upon the facts, more nearly resembles the case before us than any other coming to our notice. In that case the jury was discharged for disagreement on Sunday, and on the same day the defendant was ordered committed pending a retrial. The fact that the committing order was made on Sunday may distinguish that case from the one here. But the court in that case, while apparently not questioning the general rule that an improper discharge of a jury would not ordinarily deprive the court of further jurisdiction, held that the order of discharge on Sunday being a void act, habeas corpus became a proper remedy for the prisoner's discharge. One of the cases cited by the court in support of its conclusion is *Maden v. Emmons*, 83 Ind., 331, which has since been overruled in Indiana, as above noted. The case of *State v. McGimsey*, 80 N. C., 377, also cited, was not a habeas corpus case, but was before the appellate court on *certiorari*; and that was held a proper remedy for the review of the error complained of in the exercise by the court below of its jurisdiction. The case of *Ex parte White*, 15 Nev., 146, which is also cited, depended upon the application of a different principle. There a magistrate had on Sunday received a plea of guilty and entered a sentence of imprisonment. Under such a condition the accused was clearly held under a void judgment, assuming that the court was not authorized to sit or render judgment on Sunday.

Notwithstanding that the Oregon court, for whose opinions we entertain great respect, seems to distinguish the discharge of a jury upon a non-judicial day from a discharge upon a lawful day for an improper or unauthorized reason, in its effect upon the jurisdiction of the court, we think that the case cited is out of harmony with the general line of decisions respecting the jurisdictional consequences of an unnecessary or irregular discharge of a jury on a criminal trial.

We are unable to agree with the reasoning and conclusion of the Oregon case that a void act discharging the jury operates to divest the court of further jurisdiction in the case. As previously suggested, whether the discharge be a void act, because occurring on a non-judicial day, or improper or unauthorized for any other reason, the trial, through the irregular or unauthorized act, will have come to a close without a verdict, so that, if the act of discharging the jury be held to have been unauthorized and not to have been waived by any act or conduct of the defendant, if a waivable matter, the latter will have been in jeopardy. By such erroneous procedure, however, the court does not divest itself of jurisdiction to hear and determine any further motions, pleas or other applications that may be presented in the case; and even to hold another trial of the case if a plea of former jeopardy should be heard and overruled, although, in doing so, grave error may be committed.

Suppose it to be conceded that the act of the court in discharging the jury was absolutely void. The prisoner is not held under that order, any more than if he should be held under a warrant of arrest or commitment upon a new information. The old information is still pending and undisposed of, and the plaintiff's commitment is for trial thereon. She has already submitted a plea of some kind in bar of another trial, and that plea has been overruled. Let it be assumed that she interposed in defense of the pending charge the former proceedings, or that she will do so. If it be true that those proceedings amounted to an acquittal, then her plea ought to be sustained, and the court has erred or may err in otherwise disposing of it. But the jurisdiction of the court to hear and determine the plea is clear, it seems to us; and the error, if any, in such determination may be reviewed and corrected before the proper court in the mode pointed out by law. It ought not to be considered on habeas corpus, in which proceeding this court has no greater authority than a single justice, or a district judge would have upon a similar application. We are of the

opinion that, though it is possible that the court may have erred, its act in committing the plaintiff was within the legitimate province of the court while acting in a lawful manner; and, by express command of the statute, it is not permissible in this proceeding to question the correctness of the committing order.

For the above reasons we think it not only unnecessary, but improper, to consider the other questions presented; and we are constrained to refuse to discharge the plaintiff from the custody of the sheriff.

BEARD, J., and SCOTT, J., concur.

ROSS v. STATE.

APPEAL AND ERROR—EXCEPTIONS—CRIMINAL LAW—ASSAULT—ASSAULT WITH INTENT TO COMMIT RAPE—UPON FEMALE UNDER AGE OF CONSENT—INDICTMENT AND INFORMATION—INSTRUCTIONS—UPON LOWER GRADES OF OFFENSE—INTENT—EVIDENCE—BRIEF—REHEARING.

1. Error assigned upon the overruling of a motion to instruct the jury to return a verdict for the defendant in a criminal case when the state rested its case cannot be considered when the record fails to show an exception to the ruling.
2. In a prosecution for an assault upon a female child under the age of consent with intent to commit rape, an instruction is not objectionable as defining a crime unknown to the statute which states that an attempt of a man to carnally know a female child under the age of six years would be an attempt to commit a violent injury to such child as alleged in the information, since it does not purport to describe a complete crime, but merely one of the elements of assault as charged in the information.
3. To have carnal knowledge of a female under the statutory age of consent is rude, as well as unlawful, and within the contemplation of the statute defining assault, constitutes a violent injury.
4. An information alleged that defendant "did unlawfully and feloniously attempt to commit a violent injury on the person

of (name), a female child under the age of 18 years, he, the said (defendant), having then and there the present ability so to do, with intent then and there to ravish and carnally know the said (child)." *Held*, (1) a statutory assault is alleged. (2) An assault being alleged in the language of the statute, coupled with an averment of the specific felonious intent, the information is good for assault with intent to commit rape.

5. Where elements not existing in the similar common law offense are contained in the statutory definition of a crime, the courts are not bound in construing the statute by the construction which obtained with reference to the common law offense.
6. Since the word "ravish" does not occur in the statutory definition of rape, its use is not necessary in an indictment or information charging that crime under the statute, and when used it may be treated as surplusage.
7. In an information charging an unlawful and felonious assault with intent to ravish and carnally know a female child under the statutory age of consent, the word "ravish," as presupposing force in the assault, may be treated as surplusage, since the intent, in such case, will be felonious whether the accused contemplated resistance on the part of the female or not.
8. Carnal knowledge of a female under the statutory age of consent, as well as at common law when the female is under the age of ten years, is conclusively presumed to have been accompanied with force and against consent.
9. Since, by statute, a female under the age of eighteen years is legally incapable of consenting to carnal knowledge of her person, she is incapable of consenting to an assault upon her with intent to commit rape.
10. Upon a charge of assault with intent to commit rape upon a female under the statutory age of consent, it is immaterial whether she consented to the act constituting the assault or resisted.
11. Physical resistance, as implied in an assault, is not a necessary element in an assault with intent to commit rape upon a female under the statutory age of consent, as, under the statute, she has no legal capacity to consent to the act of carnal knowledge, and every act done in furtherance of a purpose to know her carnally is unlawful and felonious, and, if such acts would constitute an assault if done without her consent, no act of hers can waive the assault.

12. In a prosecution for assault with intent to commit rape upon a female under the statutory age of consent, an instruction was properly refused which required that, in order to convict, the jury should be satisfied that the intent of the accused was to have carnal knowledge of the child's person at all events and notwithstanding any resistance on her part.
13. When the evidence on a criminal trial shows the accused to be either guilty of the higher grade of the offense charged, or not guilty, the court is not required to instruct upon the lower grades.
14. The evidence showing that defendant was either guilty of assault with intent to commit rape as charged, or not guilty, and simple assault was not proven, nor assault and battery charged, it was not error to refuse an instruction that the jury might find the defendant guilty of assault, if not satisfied that the assault was committed with the felonious intent to commit rape.
15. Whether an assault was committed with the felonious intent charged in an indictment or information is to be determined by the jury upon a consideration of all the facts and surrounding circumstances as disclosed by the evidence.
16. The evidence in a prosecution for assault with intent to commit rape upon a girl six years of age held sufficient to justify a conviction.

ON PETITION FOR REHEARING.

1. The competency of a particular witness is not presented where the only question upon the evidence discussed in counsel's brief is its sufficiency and weight.
2. Where a question as to the competency of a witness for the other party was not presented or referred to in the brief of counsel, it is not properly raised for the first time on petition for rehearing.
3. Alleged incompetency of a witness for the other party cannot be considered on error where it was not assigned as a ground in the motion for new trial, nor assigned as error.

[Decided January 20, 1908.]

(93 Pac., 299.)

[Rehearing denied March 9, 1908.]

(94 Pac., 217.)

ERROR to the District Court, Sheridan County, HON.
CARROLL H. PARMELEE, Judge.

Assault with intent to commit rape upon a girl under the statutory age of consent. The defendant, Charles Ross, was convicted, and prosecuted error. The facts are stated in the opinion.

S. P. Cadle, for plaintiff in error.

The evidence is not sufficient to sustain the verdict. The instruction that an attempt to carnally know a female child under the age of six years, whether with or without her consent, is an attempt to do a violent injury to such child was error. There is no such crime in this state. The crime of rape implies force and resistance; two things must have concurred in order to convict the defendant: First, there must have been an assault, coupled with an intent to commit rape upon the person assaulted. An assault implies force on one side and repulsion, or at least want of consent, upon the other, and there was not a scintilla of evidence to show any force used or any resistance offered, and for this reason the motion to direct a verdict for defendant should have been sustained. (*State v. Smith*, 12 O., 466; *State v. Pickett*, 11 Nev., 255; *State v. Hagerman*, 47 Ia., 151; *State v. Canada*, 27 N. W., 288; *State v. Kendall*, 34 N. W., 844; *State v. Fleming* (Cal.), 29 Pac., 647.)

The refusal to instruct that defendant might be found guilty of assault, if the intent to rape was not found to be proven, when such instruction was requested, was error. There is no evidence in the case of actual violence. If the defendant was guilty at all there must have been an actual assault, and we maintain that this question should have been submitted to the jury; had there been any evidence of actual violence to the person of the child, then it might have been proper to refuse to submit the question of assault. (*State v. Vinsant*, 49 Ia., 241; *State v. Pennell*, 8 N. W., 686; *State v. Trusty*, 92 N. W., 677; *State v. Egbert*, 101 N. W., 191.) The crime of assault with intent to commit rape is not created or defined by the statute. A

prosecution for such a crime must come under Section 4956. It may be conceded that if defendant had used force and violence upon a female over the age of consent, with the intent to ravish and carnally know her, the crime of felonious assault would have been committed, and he might have been convicted of such felonious assault. There being no such crime as assault with intent to commit rape known in this state, it cannot be assumed that the pleader intended to charge such an offense. The information, omitting all reference to the felony, is complete under Section 4957, charging an assault. It is a rule in criminal pleading that the indictment will be sufficient if the crime is charged substantially in the language of the statute. Applying this rule to the case at bar, we have every ingredient of Section 4957 included in the information, to which is added the charge with intent to commit a felony.

It is contended by the defendant that these words, giving the information its true meaning, are merely surplusage. They might have been omitted from the information and the crime of assault would have been completely charged. The words constituting an assault were wholly unnecessary in an information under Section 4956. Defendant, therefore, contends that the court erred in each instruction given to the jury in which a felonious assault was submitted for their consideration. The instruction should have been that if the jury found the defendant guilty, it should be only of assault. The extreme youth of the girl suggests the possibility of the defendant having committed a violent injury upon her. But, assume that she was sixteen years of age, and willing to submit to defendant, such would not necessarily be true. Yet the statute makes no distinction, so far as statutory rape is concerned, between a child of twelve and a more mature woman of seventeen. The court would not employ the fiction necessary to hold that preparation to have intercourse with a woman seventeen years of age, with her consent, was an assault with intent to commit a violent injury upon her. And yet that is necessary to constitute

an assault within the definition of Section 4957. The statement of the above proposition is conclusive that the intent of the legislature was not to provide punishment for the offense, for which the defendant was convicted. Assault, whether we adopt the meaning approved in *State v. Wyatt*, 41 N. W., 31; *Hayes v. People*, 1 Hill, 351; *State v. Godfrey*, 20 Pac., 625; *List v. Miner*, 49 Atl., 856; *Prince v. Riddge*, 66 N. Y. Supreme, 454; *Lane v. The State*, 4 So., 730; and many others, or the definition embraced in Section 4957, implies force and not consent. By no fiction of the law will consent be made to mean force. Many states, including Wyoming, have made improper relations with a female, under a certain age, with her consent, a crime, and some statutes have called it rape. The name given it by the statute adds nothing to the crime, and, in no sense, brings it within the definition employed to define the offense at common law. There is no evidence or thought of resistance in this case; in fact the child had not the slightest conception of the purpose or intention of the defendant. If the testimony of the State be conceded to be true, the defendant may have had the present ability to do a violent injury upon the girl, but no force whatever was employed or attempted. Therefore, no assault was committed. We do not mean to say that the common law offense may not be committed upon a female under the age of consent. The same force might be used upon such a person as an older one, but we do say, and the authorities sustain the contention, that there can be no assault, or an assault with intent to commit the crime, so long as the offender offers no force, and the female no physical resistance.

The courts uniformly make a distinction between an attempt and assault with the intention of committing a crime, and the mere preparation to commit a crime without any act having been done toward the commission of the offense. (*State v. Long*, 37 A. S. R., 505; *Johnson v. State*, 43 N. W., 425; *Fox v. State*, 34 O. St., 377; *Kelly v. Com.*, 1 Grant, 484 (Pa.); *Franklin v. State*, 29 S. W., 1088;

Patrick v. People, 24 N. E., 619; People v. Youngs, 31 N. W., 114; People v. Webb, 86 N. W., 406.) As charged in the information, the attempt to commit a violent injury consisted only of the intention of the defendant to carnally know the girl. The information was demurrable, but as it charged no crime whatever, the court erred in overruling defendant's motion for a verdict, and in giving each instruction submitted to the jury. As to the error in the instructions we cite, in addition to the others, State v. Krum, 28 N. W., 278.

W. E. Mullen, Attorney General, for the State.

Defects in the form of an indictment or information, or in the manner in which the offense is charged, may be met by motion to quash. (R. S., 5322; Wilbur v. Ter., 3 Wyo., 268; Koppala v. State, 89 Pac., 576.) Or by demurrer, when the facts stated in the indictment or information do not constitute an offense. (R. S., 5324.) Defects which may be excepted to by motion to quash or plea in abatement, will be taken to have been waived by demurring, pleading in bar, or not guilty. (R. S., 5326; Wilbur v. Ter., *supra*; Tway v. State, 7 Wyo., 74; Koppala v. State, *supra*.) A motion in arrest may be granted for want of jurisdiction or when the facts stated do not constitute an offense. (R. S., 5418.) No exception was taken by either of the methods indicated. And there is no apparent reason why exceptions of the kind should have been taken. The information was exceptionally well prepared and clearly sufficient. Counsel displays a misconception of the object and intent of Section 4956, Revised Statutes. "Felonious assault" is not made a specific offense by the section, and any assault and battery with intent to commit any offense enumerated as a felony by statute, comes within its provisions. An information which charges assault, or assault and battery, in the language of the section defining either of them, followed by an averment of intent at the time, to commit a felony, describing the felony in the language of

the section defining it, is good. (*Bryant v. State*, 5 Wyo., 376.) That the information here charges an assault, including all of the ingredients of that offense as defined by statute, and also charges a felonious intent to commit statutory rape, setting forth all of the ingredients of that offense as defined by statute, there can be no question. Counsel has erroneously assumed that an offense of this character must be charged under some specific section of the statutes; whereas, the information relates to three separate and distinct sections of the statute. (Secs. 4956, 4857, 4864, R. S. 1899.) These statutes, taken from Indiana, had, at the time of their adoption, been construed by the highest court of that state, and the practice with reference to their application to cases of this character was well settled. Under a well established rule, the construction given them by the Indiana court was likewise adopted here. In that state indictments similar to the one here are approved. (*Dooley v. State*, 28 Ind., 239; *Greer v. State*, 50 Ind.; *McGuire v. State*, 50 Ind., 284; *Shaggs v. State*, 108 Ind., 853; *Polson v. State*, 137 Ind., 525; *State v. Duggin*, 146 Ind., 427.)

The offense of assault, under the statute, is not the actual commission of a violent injury on the person of another, but an attempt to do so. Just what acts would constitute an "attempt" or a "violent injury" are questions of fact depending to such an extent upon the particular facts and circumstances of each case that it is difficult for the courts to establish a uniform rule. Without entering into a detailed discussion of the revolting circumstances shown by the transcript of the evidence, we submit that the position, acts and general conduct of defendant from the time he was first discovered by the child's mother until arrested by the constable, considered in connection with his feeble attempt to give a reasonable explanation of his conduct, indicates his guilt beyond question, and witnesses who were called to testify, both in defense and in rebuttal, with reference to the character and habits of defendant, did not

improve the situation. The doctrine that an offer of violence, or a display of physical force, is a necessary ingredient of the crime of assault with intent to commit a felony, has not been accepted in this state. (*Bryant v. State*, 7 Wyo., 311.)

The trial court adopted the correct theory of the case in its instructions, and in refusing to instruct a verdict for defendant. Actual force on defendant's part, or resistance on the part of the child, was not necessary. (*State v. Sherman*, 106 Ia., 685; *Haines v. State*, 155 Ind., 112; *Addison v. People*, 193 Ill., 405; *State v. Johnson* (Cal.), 63 Pac., 842; *People v. Courier*, 79 Mich., 366; *State v. Hunter* (Wash.), 52 Pac., 249.)

SCOTT, JUSTICE.

Plaintiff in error (defendant below) was charged, tried and found guilty of an assault upon the person of a female child under the age of eighteen years with the intent to commit rape. His motion for a new trial was overruled and judgment was pronounced against him, sentencing him to a term of years in the penitentiary, and he brings error.

1. When the State rested its case the defendant moved the court to instruct the jury to return a verdict in his favor on the ground that the evidence was insufficient to convict. The motion was overruled and such ruling is here assigned as error. An examination of the record fails to show that any exception was taken to such ruling, or if it was, it is not preserved in the bill of exceptions. The question is not, therefore, properly before us and need not be discussed.

2. The court, over the objection of the defendant, gave the following instructions to the jury, viz.: "You are instructed that under the law of this state an attempt on the part of a man to carnally know a female child under the age of six years, whether with or without her consent, would be an attempt to do a violent injury to such child as alleged in the information." It will be observed that

this instruction does not purport to describe a complete crime as defined by our statute, but simply one of the elements of assault as charged in the information. In this state there is no such crime defined by the statute as an attempt to commit a felony, nor is the instruction open to the objection that it is a definition of an offense unknown to the statute. The information charges that on the 3d day of April, 1907, the defendant did "unlawfully and feloniously attempt to commit a violent injury on the person of * * * a female child under the age of eighteen years, he, the said Charles Ross, having then and there the present ability so to do, with intent then and there and thereby unlawfully and feloniously to ravish and carnally know the said * * *." To have carnal knowledge of a female under the statutory age of consent is at least rude as well as unlawful and within the contemplation of the statute constitutes a violent injury. The acts alleged in the information come within the statutory definition of what constitutes an assault as contained in Section 4957, Revised Statutes 1899, which is as follows: "Whoever having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault and shall be fined," etc. Assault and battery is defined by Section 4958, Revised Statutes 1899, as follows: "Whoever in a rude, insolent or angry manner unlawfully touches another, is guilty of an assault and battery." The information follows the language of the statute in charging the assault and that language is coupled with an averment of the felonious intent at the time and is a good information. (Bryant v. State, 5 Wyo., 376.)

As the evidence showed no resistance on the part of the girl or consent to the alleged assault, it is claimed on behalf of the defendant that she consented because she did not resist, and it is urged that the instruction is erroneous upon the ground that violence consented to does not constitute an assault and that the use of the word "ravish" in the information required proof of physical resistance. Rape

is defined by Section 4965, Revised Statutes 1899, as follows: "Whoever unlawfully has carnal knowledge of a woman forcibly and against her will, or of a woman or female child under the age of eighteen years, either with or without her consent, is guilty of rape, and shall be imprisoned in the penitentiary for a term not less than one year, or during life." Section 4956, Revised Statutes 1899, is as follows: "Whoever perpetrates an assault or an assault and battery upon any human being with intent to commit a felony, shall be imprisoned in the penitentiary not more than fourteen years." It is clear that a comparison of the above sections shows that rape includes the crime of assault as defined by Section 4957, *supra*, and when a woman over the age of eighteen years who at the time is not under duress or fear and is mentally competent to do so consents to sexual intercourse, then there is no assault either in the attempt to have or in the consummation of such intercourse. It is equally true and all the authorities agree that carnal knowledge of a female who at the time is under the statutory age of consent, regardless of the frame and condition of her mind, is conclusively presumed to have been committed with force and against her consent, and her acts and conduct would be no defense to the charge of rape. While this is true as to the crime of rape, there is some conflict in the decisions as to whether a conviction can be had for an assault with intent to commit rape upon a female under the age of consent where it is shown that she made no resistance and was willing to perform the sexual act.

The above statutory definitions of assault and assault and battery are identical with the corresponding sections of the statutes of Indiana and differ materially from the common law definitions. The present ability to inflict an injury is not necessary to an assault at the common law, and any unlawful touching of one against his will with intent to injure constitutes a battery, while under the statute the touching must be unlawful and in a rude, insolent or angry

manner. (Bish. Stat. Crimes (3d Ed.), Secs. 501, 502.) By the common law an assault must be accompanied by physical force creating a reasonable apprehension of immediate physical injury to a human being, and a battery was not committed unless the act alleged to constitute it was committed against the will of the injured party. (2 Bish. New Cr. Law, Secs. 23, 28, 70.)

The English authorities hold that as an assault implies the use of physical force or violence, there can be no such force or violence necessary or used when there is no repulsion or resistance, and that there is no assault when the female, whatever her age, does not resist, but consents to the acts which constitute the alleged assault. The rule is stated in Bishop on Statutory Crimes (3d Ed.), Sec. 496, as follows: "While the common form of attempt to commit the ordinary rape is by assault with such intent, and on an indictment for rape there may be a conviction of assault if no technical rule prevents, in matter of principle, and by the better judicial determinations, there cannot be, under the common law rules, an assault with intent to have the criminal carnal knowledge of a girl with her consent; because by the common law rule violence consented to is not an assault and the statute which makes her consent immaterial in defense of the carnal knowledge does not extend also to the assault." Of the American cases cited in the foot note as supporting that doctrine, *Whitcher v. State*, 2 Wash., 286, has been overruled in *State v. Hunter*, 18 Wash., 670 (52 Pac., 249); *Harden v. State*, 39 Tex. Cr. R., 426 (46 S. W., 803), has been overruled in *Croomes v. State*, 40 Tex. Cr. R., 672 (51 S. W., 924); *Stephens v. State*, 107 Ind., 185 (8 N. E., 94), was overruled in *Murphy v. State*, 120 Ind., 115 (22 N. E., 106). This rule does not seem to have found much favor with the American courts, for, so far as our research has enabled us to determine, it is now followed by but two of those courts. (*State v. Smith*, 12 O., 466; *State v. Pickett*, 11 Nev., 255.) The weight of authority is overwhelmingly the other way, and

to the effect that such consent is unlawful and does not waive the assault. (People v. McDonald, 9 Mich., 150, 152, 153; People v. Courier, 79 Mich., 366 (44 N. W., 571); Cliver v. State, 45 N. J. L., 46; Com. v. Roosnell, 143 Mass., 32 (8 N. E., 747); Territory v. Keyes, 5 Dak., 244 (38 N. W., 440); State v. Daucy, 83 N. C., 608; Hays v. People, 1 Hill (N. Y.), 351; Brown v. State, 6 Baxt., 422; Fizell v. State, 25 Wis., 364; People v. Laurintz, 114 Cal., 628 (46 Pac., 613); People v. Vann, 129 Cal., 118; State v. Wray, 109 Mo., 594 (19 S. W., 86); State v. Grosheim, 79 Ia., 75 (44 N. W., 541); Polson v. State, 135 Ind., 519 (35 N. E., 901); Hanes v. State, 155 Ind., 112; Leibscher v. State, 69 Neb., 395 (95 N. W., 870); State v. Sargent, 36 Ore., 110 (49 Pac., 889); Farrell v. State, 54 N. J. L., 416 (24 Atl., 723); *In re Lloyd*, 51 Kan., 501 (33 Pac., 307); Addison v. People, 193 Ill., 405; 2 Am. & Eng. Ency. L. (2d Ed.), 987, and p. 361, Vol. I, of Suppl., and cases cited in the foot notes; 1 McClain Crim. Law, Sec. 464.)

The difference in the holdings may, however, be accounted for in the fact that the cases in this country have turned upon the construction of the statutory definition of assault rather than upon the common law definition of that offense. In construing a statute which contains new and different elements the courts are not bound by that construction which obtained with reference to the common law offense. The statutory changes were evidently meant to remedy some imperfections which were recognized to exist. The statute, by apt words, created and defined a new crime which is a substitute for the common law offense, and the rules appertaining to the latter, except in so far as they are applicable, have to yield to the statutory rules of construction. In *Croomes v. State*, *supra*, there was a conviction for an assault with intent to commit rape on the person of a female under fifteen years of age, that being the statutory age of consent in that jurisdiction. The court say: "The code provides that any unlawful violence upon

the person of another, whatever be the manner or degree of violence, is an assault. There is no statute or construction of a statute on the question of assault saying that the consent of the injured party prevents the act from being an assault. If the act is unlawful it is an assault. The mere fact that the party injured consents to it does not prevent it from being an assault."

It will be observed that the information charges the defendant with having perpetrated an assault with the felonious intent to "ravish and carnally know." The word "ravish" presupposes force and was indispensable in the common law indictment for rape, but does not occur in the definition of that crime given in our statute and for that reason its use is not necessary in describing the offense. (*Tway v. State*, 7 Wyo., 74.) There must be resistance and force used in overcoming such resistance in rape where the female is over the age of consent, either under the common law or under the statute; and carnal knowledge of a female under the statutory age of consent and also at the common law when such female is under the age of ten years is conclusively presumed to have been accompanied with force and against consent, and in an indictment or information, therefore, under and following the words of the statute the word "ravish" is unnecessary and may be treated as surplusage. (Sec. 486, Bish. Stat. Cr. (3d Ed.) We are not, however, dealing with the completed offense of rape. The charge is of an assault with intent to commit a felony, and if the intent was to carnally know a female under the statutory age of consent, then such intent was felonious regardless of whether the accused contemplated resistance on her part or not. The word "ravish" as used in the information did not impose any greater burden upon the State than proving the elements of the offense as defined by the statute and which are charged in the information, and it may, therefore, be treated as surplusage.

A distinction is made and carried into the decisions between attempts to commit and an assault with intent to

commit a felony. In the former the question of assault is not necessarily involved, while in the latter it is an essential element of the crime charged and as such must be proven. (People v. Dowell, 135 Mich., 306 (99 N. W., 23.)

While the statutory definition of assault implies force, it does not necessarily follow that there must be proof of actual or physical resistance on the part of the person assaulted, for in the absence of such proof the law implies resistance. An assault may be committed under such circumstances that the person assaulted is entirely ignorant of any attempt to commit a violent injury to his or her person, as when the assailant having the present ability to do so unlawfully attempts but is interrupted from doing violence to the person of one who is asleep, or, of one who is passing along a crowded street. So it may be said that absence of resistance resulting from physical inability or want of opportunity to resist, or consent to the act constituting an assault which proceeds from a disordered or insane condition of the mind, is no consent and does not strip the act so committed of its criminal character. Putting in fear is not always necessary at common law. (Sec. 33, 2 Bish. New Cr. Law.) Nor is it an element of assault as defined by our statute, though it may be involved in the proof as a part of the *res gestae*, and if the acts constituting the attempted injury are unlawful, and the other elements are present to constitute an assault, that crime is complete and none the less a crime because of non-resistance by the injured party. The evidence is undisputed and shows that the girl was between four and five years of age at the time of the assault, and by all the authorities by reason of her age she had no legal ability to consent to the sexual act; and if that is so it seems incredible that she could lawfully consent to the acts and preparations which constituted in themselves an unlawful attempt coupled with a present ability to do a violent injury to her person simply because the purpose intended was not consummated.

In a well considered case the supreme court of Washington say: "The offense of carnally knowing a female

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child under the age of twelve years necessarily includes the less offense of assault with intent. The complete offense is merely an aggravation of the felonious assault, and the child's legal inability to consent to the sexual act also extends to and includes any attempt to commit it; in other words, she lacks capacity to consent to the force which, in the absence of consent, would constitute an assault." State v. Hunter, *supra*.) The acts constituting the alleged assault could have been proven upon a trial on the charge of rape as a part of the *res gestae*, and evidence that she consented would have been inadmissible as not tending to prove any defense to the charge. The reversal of a conviction of the lesser and included offense of assault with intent to commit rape would scarcely be justified upon the ground that the defendant had not been permitted to show the frame of mind of the one so assaulted when the latter was within the statutory age of consent. In such a case the law implies resistance, for under the law there can be no consent. In *People v. Verdigreen*, 106 Cal., 211 (46 Am. St. Rep., 234), there was a conviction for an assault with intent to commit rape upon the person of a female child under the statutory age of consent. The evidence showed that she went voluntarily to the room of the accused and submitted, without resistance, to his advances. The code defined rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: (1) When the female is under the age of fourteen years. (2)" etc. (Pen. Code, Sec. 261.) It was there urged as here, that there can be no such thing as an assault upon a consenting female regardless of the fact that she may be under the age when she can legally consent to the sexual act. The court say: "It is true that an assault implies force by the assailant and resistance by the one assaulted, and that one is not in legal contemplation injured by a consensual act. But these principles can have no application to a case where under the law there can be no consent. Here the

law implies incapacity to consent, and this implication is conclusive. In such case a female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. "The law resists for her." To the same effect is *People v. Vann, supra*. This rule would not, however, apply when the female was over the age of consent. (*People v. Fleming*, 94 Cal., 308.)

The action was not for the redress of a private wrong. The defendant was answerable to the state for such conduct as the state had declared to be criminal. She was a ward of the state and his conviction was sought not alone to punish him, but also for the moral and salutary effect it would have in preserving the chastity of those similarly situated and in carrying out the duty it owed to those to whom in its wisdom it had thrown out the protecting arm of the law. Its policy and the intendment of the law is not to withhold punishment until that has been destroyed which was sought to be protected. In *Croomes v. State, supra*, the court say: "To say that the legislature of Texas would hang a man for the consummated act of rape, and yet not desire to punish him at all for assault with intent to rape under any contingencies, is a proposition to which we cannot agree. Then, if the legislature did not intend such a construction, we feel constrained, if the language of the statutes is susceptible of a rational, sensible and reasonable construction that will give validity, strength and force to every phase of the law, that that construction should be adopted." It is said in *Black Interp. Laws*, p. 73, that: "It is generally true that, where words in a statute are clear and unambiguous, there is no room left for construction; but when it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and carried out, and made to control the strict letter." And again: "Every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is

ambiguous or admits of more than one meaning, it will be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." (Id., p. 56.) The law having declared that a female under the age of eighteen years is legally incapable of giving consent to the sexual act, the intended scope of the law and the purpose of the legislature in enacting it do not permit of a construction which would limit her incapacity to consent to that act alone, but rather that such incapacity extends to and includes any attempt to commit it. Not having legal capacity to act for herself in such matters the state, no matter what her frame and condition of mind may be at the time, acts for and in her behalf. In such a case the law regards her as resisting.

We do not go so far as to hold under our statute that force is not an element of the crime charged. An assault is an assault whether perpetrated with or without the intent to commit a felony. Our discussion has been limited to the question of the necessity for resistance to an assault; and, as we have seen, physical resistance is not always necessary and the resistance may be in some cases only such as the law implies. We are of the opinion that physical resistance, as applied in an assault, is not a necessary element in an assault with intent to rape a female under the age of eighteen years, as, under the statute, she has no legal capacity to consent to the act of carnal knowledge, and every act done in furtherance of a purpose to know her carnally is unlawful and for a felonious purpose, and if such acts were so committed as to constitute an assault without her consent, then no act of hers could waive such assault.

3. The court refused to give the following instruction requested by the defendant, viz.: "In arriving at the conclusion as to whether or not the State has proved the intent beyond a reasonable doubt the jury must be satisfied not only that the prisoner intended to gratify his passions on the person of the child, but that he intended to do so at all

events, notwithstanding any resistance on her part; and unless you do so find from the evidence, then you are instructed that you must find the defendant not guilty." In considering whether this instruction correctly states the law as applied to the facts, it must be borne in mind that in this case it is the intent to carnally know a female under the age of eighteen years, with or without her consent, which is felonious. Such an intent in the absence of any overt act would not be sufficient to convict as lacking the element of assault, yet if attempted to be carried into effect by such an assault the crime is complete whether such assault be resisted or not. There is a marked distinction in this case and where one has an intent to carnally know a female over the age of eighteen years, for in the latter any such intent is only felonious when it is attempted to be carried into effect forcibly and against the will of such female. This instruction carries with it the idea that the felonious intent could only exist when resistance was offered, whether the female be over or under the statutory age of consent. As we have seen, this is not the law with reference to an assault committed with intent to rape a female under that age. (People v. Roach, 129 Cal., 33, and other cases, *supra*.) The court properly refused to give this instruction.

4. It is urged that the court erred in refusing to instruct the jury that if they were satisfied beyond a reasonable doubt that the defendant assaulted the child, but were not so satisfied that the assault was committed with the felonious intent to commit rape, then they should acquit him of the crime of assault with intent to commit rape and find him guilty of assault.

The evidence in this case tended to show that on the 3d day of April, 1907, some little boys were playing by a ditch in the vicinity of the town of Dietz, in Sheridan County. A female child between four and five years of age was seen to cross a bridge over the ditch going in the direction of where the boys were, and in doing so, she had to pass near where the defendant was sitting on a pile of dirt.

When the little girl came along to where he was the defendant got up, took her by the hand and led her to a bench in the rear of a building and out of sight of where the other children were. The mother was informed that defendant had her child and she went and discovered the little girl sitting on a bench, her clothes above her knees, and the defendant kneeling before her, his pants unbuttoned and his privates in his hands. Upon being spoken to by the mother, the defendant arose and fled, and shortly thereafter an officer discovered him in hiding behind some barrels in the rear of a nearby saloon and arrested him. The defendant testified in his own behalf that he had no intention of carnally knowing the child; that he neither touched her nor led her to the bench; that he was not kneeling before the child; that he was standing up, and that his pants were unbuttoned for the purpose of answering a call of nature, and denied that he fled or was in hiding from the officer. He also introduced evidence to show his reputation for morality with little girls, which was met and combatted by evidence properly admitted in rebuttal on behalf of the State tending to show that his reputation in that respect was bad, and upon cross-examination by defendant's counsel incidents of indecent exposure to and chasing of little girls by him were drawn out.

It will be observed that the line between the evidence for the State and the defendant is clear and distinct. If the defendant's testimony be true, he was not guilty of an assault as charged in the information, while the State's evidence tended to show that the defendant, if guilty at all, was guilty of an assault and battery. This did not constitute a variance. (Com. v. Thompson, 116 Mass., 349.) The overt act which was relied upon for a conviction was a rude and unlawful touching of the child. The evidence showed the act to be at least rude and if done with the intent to carnally know her, such touching was certainly unlawful and comes within the definition of assault and battery as defined by Section 4958, *supra*, which includes the lesser of-

fense of assault as charged in the information and as defined by Section 4957, *supra*. While this is true, it is only so from a legal standpoint, and it does not always follow that the question of simple assault must be submitted to the jury upon a trial for the greater crime which includes it. The instructions must and should be predicated upon the evidence in the case, and when the evidence shows the accused to be guilty of the higher grade of the offense or not guilty the court is not required to instruct upon the lower grades.

In *Brantley v. State*, 9 Wyo., 102, 109, *Brantley*, upon a conviction for an assault with intent to commit murder, complained that the court refused to instruct the jury that he might under the information be found guilty of an assault only. This court held that upon the evidence he was not entitled to the instruction, and after reviewing the evidence, said: "If guilty at all, he was guilty of an assault and battery. There was no evidence of simple assault." This rule has been the established rule in a long line of decisions by the supreme court of Iowa. In *State v. Shuman*, 106 Ia., 684, 687, it was assigned as error that the court in a prosecution for rape did not submit to the jury the question of simple assault. The court, after referring to the previous holding by that court to the effect that the right to instruct on a lesser and included offense of the crime must be governed by the evidence, say: "The holding is decisive of the present assignment in this case. If there was not an assault with intent to commit rape, there was no crime committed. No other conclusion could properly be arrived at from the evidence." In the case before us assault and battery was not charged nor was simple assault proven. Upon the record the defendant could only be found guilty of an assault with intent to commit rape as charged or not guilty, and the court so instructed.

5. It is urged that the verdict is not supported by the evidence. In support of this contention it is argued that there is no evidence in the case to show that the defendant intended to carnally know the child, or, in other words, that

the State failed to prove the felonious intent which is an essential element of the crime charged. In *Bryant v. State*, 7 Wyo., 311, where there was a conviction for an assault with intent to commit murder, the same error was assigned and this court held that it was unnecessary to prove the specific intent by direct, positive and independent evidence, and that in such a case the jury should take into consideration all the facts and surrounding circumstances as disclosed by the evidence and find therefrom whether the acts of the accused constituting the alleged assault were done in pursuance of a felonious intent. It is unnecessary to again repeat the evidence. The jury were fully warranted in finding therefrom that the acts of the defendant were done with the intent to carnally know the child, and this intent being so established, together with the other evidence in the case, was sufficient to support the verdict. The theory upon which the defendant presented his case to the jury, viz.: that his acts amounted only to indecency, did not commend itself to the jury, and, the record being clear of error, the conclusions reached and expressed by their verdict must stand.

It follows that the judgment must be, and it is hereby, affirmed. *Affirmed.*

POTTER, C. J., and BEARD, J., concur.

ON PETITION FOR REHEARING.

PER CURIAM.

The plaintiff in error has filed a petition for rehearing.

It is here urged that the court misconstrued the evidence when it said in the opinion filed that the evidence tended to show that the bench to which the defendant took the little girl was out of sight of the little boys who were playing in that vicinity. The mother of the little girl so testified, and it may be that this statement was untrue or that she was mistaken. But even so the jury may well have inferred that the defendant felt secure though but a short distance from where he could have been seen by some little boys

aged 8, 6 and 3 years, who were at play and where no adult was near to intercede and prevent him from carrying out his purpose. The question of the defendant's guilt upon the whole evidence was one for the jury.

It is also complained that the court failed to pass upon the competency of the witness, Irvin Harrison. The case was submitted on briefs, and one of the questions argued in the briefs was the sufficiency and weight of the evidence and did not go to the competency of this witness. The question may, therefore, be deemed to have been waived (*Horn v. State*, 12 Wyo., 80) and could not have been raised for the first time on petition for a rehearing. (*Bank v. Ludvigsen*, 8 Wyo., 230; *Boswell, Adm'r., v. Bliler*, 9 Wyo., 277.) But even if it had been discussed in the briefs this court could not have considered it, for it was not specifically assigned as a ground in the motion for a new trial, nor is it here assigned as error. (*Hogan v. Peterson*, 8 Wyo., 549; *Wilson v. O'Brien*, 1 Wyo., 42; *Wolcott v. Bachman*, 3 Wyo., 335; *Boulter v. State*, 6 Wyo., 66; *Castee v. State*, 9 Wyo., 267; *Todd et al. v. Peterson, Adm'r., &c.*, 13 Wyo., 513; *Delaney v. State*, 14 Wyo., 1; *Koppala v. State*, 89 Pac., 576.)

No other question is here presented which was not discussed in the opinion filed.

Rehearing denied.

CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY v. MORRIS.

APPEAL AND ERROR—SPECIAL FINDINGS BY JURY—CONFLICTING EVIDENCE—RAILROADS—COMMON CARRIERS—TRANSPORTATION OF LIVE STOCK—LIABILITY FOR INJURIES—NEGLIGENCE—DEFECTIVE CAR—DELAYED TRAIN—SHIPPER'S DUTIES—QUESTION FOR JURY—CONTRACT OF SHIPMENT—NEW TRIAL—STATEMENT OF GROUNDS—SUFFICIENCY—JUDGMENT ON SPECIAL FINDINGS.

1. A special finding of the jury in connection with a general verdict will not be disturbed on error on the ground that it is not supported by the evidence, where the evidence upon the point is conflicting.
2. It is incumbent upon a railroad company as a carrier of live stock to furnish a car properly equipped to safely transport the animals to their destination, and it will be liable for injuries resulting from a failure in that respect.
3. The failure of a shipper of live stock to inspect the car furnished by the carrier for their transportation will not relieve the carrier from liability for injuries to the animals resulting from a defect in the car so furnished, since it is not the duty of the shipper to make such inspection.
4. In an action for injuries to live stock during transportation by a railroad company, delay in reaching an unloading point was material as bearing upon the question of proper equipment to handle the train and transport the animals with reasonable dispatch to where they could be unloaded and cared for.
5. While it is not every delay that entitles a shipper of live stock to damages for injuries sustained by the animals during transportation, a delay caused by the negligence of the carrier and contributing to the injuries will constitute a proximate cause, and support an action for damages.
6. The overloading of an engine, or a defective engine, which causes a delay, is evidence of negligence, and where such negligence contributes to the injury, damages are recoverable.
7. Whether the negligence of the carrier of live stock in furnishing a defective car and delay in transit constituted the proximate cause of injuries sustained by some of the animals during transportation by getting down and being trampled upon is a question for the jury.

8. The rights, duties and obligations created by a shipping contract are questions of law to be determined by the court.
9. Where a shipment is under the terms of an express contract between shipper and carrier, the rights of the parties must be measured thereby.
10. A shipment of horses having been made under an express written contract between the shipper and carrier, whether it was the duty of the shipper to go with the horses, or have someone do so, was a question of law, and improper to be submitted to the jury for a special finding.
11. Where an interrogatory for special finding in connection with a general verdict is improperly submitted because involving a question of law and not of fact, an answer thereto by the jury that there is no evidence upon it cannot be regarded as prejudicial.
12. Where, in connection with a general verdict against the carrier, in an action for injuries to horses during transportation, the jury returned a special finding the injuries were caused by a damaged car and delayed train; *Held*, that under the verdict and finding the failure of the shipper to accompany the horses, or send someone with them, to care for them, as provided in the shipping contract, did not contribute to, and was not the proximate cause of the injuries.
13. Though a carrier is not liable for injuries to animals during transportation resulting solely from their vices and natural propensities, to constitute a defense on that ground it must appear that such vices and natural propensities, either alone or in conjunction with some innocent cause, was the proximate cause of the injuries, and the burden is on the carrier to show that fact.
14. A ground for new trial stated in the motion as "errors of law occurring at the trial" is too general and indefinite to present an alleged error in excluding offered evidence.
15. A motion for judgment upon a special finding of facts returned with a general verdict is properly denied, unless there is such an inconsistency between the special findings and general verdict as to render them irreconcilable.
16. A railroad company is liable as a carrier of live stock for the loss of an animal from its car, caused by its negligence in failing to furnish a car provided with a secure and safe door to prevent the stock from falling out or escaping.
17. Damages assessed by the jury for injuries to live stock during transportation by a common carrier are not excessive when

within the evidence and not exceeding the value placed upon the animals in the contract of shipment as a limitation upon the amount of recovery.

[Decided February 10, 1908.]

(93 Pac., 664.)

ERROR to the District Court, Sheridan County, HON. CARROLL H. PARMELEE, Judge.

A. J. Morris brought the action to recover damages for injuries occurring to certain horses while being transported by the defendant railroad company. From a judgment in favor of the plaintiff, the defendant prosecuted error. The facts are stated in the opinion.

Lonabaugh & Wenzell and *N. K. Griggs*, for plaintiff in error.

The car was greatly overcrowded, and this was the shipper's fault. There is no presumption of negligence as against defendant, because of the mere falling and injuring of the stock, as the mishap is properly to be attributed, under the evidence, alone to the wilful neglect of plaintiff in sending the shipment on from Aberdeen to Sheridan without anyone to care for them on the way. The evidence fails to show that the time the horses were on the car between Aberdeen and Sheridan, had anything to do with the condition of the horses. So, if plaintiff is to recover because his stock was hurt through negligence of defendant as to this time, then such negligence is to be wholly presumed, without a word of evidence. That a coupler was broken is admitted. However, there is no evidence that this coupler in anywise affected this shipment. On the contrary, the two employes, the conductor and fireman, who alone of the trainmen could be produced at the trial, positively state, and without dispute, that the car was properly equipped with air and carefully handled, with neither jar nor jerk all the way to Sheridan.

True, the car was placed at the rear of the train and true also that the defendant usually then placed such car in front.

However, there was no evidence showing, or tending to show, that the place where this car was placed had anything to do, even remotely, with the falling or injuring of these horses. Besides, the custom then of placing stock at the front was merely for the convenience of the defendant. A different custom now prevails. The court improperly excluded offered evidence to show that the rear of the train was a proper place for the car.

Where an act or omission charged does not constitute negligence *per se*, the party sought to be held responsible may, as a general rule, show that the act or omission was sanctioned by the usage or custom prevailing among those engaged in the same business or same kind of work. (Note to 41 A. & Eng. R. Cas. N. S., 326; Granaries Co. v. Ault, 106 N. W., 418; s. c., 107 N. W., 1015; O'Neil v. R. R. Co., 92 N. W., 731; Law v. Central & C. Co., 140 Fed., 558.)

The special finding that there was no evidence as to whether it was or was not the duty of plaintiff to go himself, or to send some one, to accompany his stock while in transit from Aberdeen to Sheridan, so as to prevent his horses from falling and being injured, is not only contrary to the fact, as shown by the testimony, but is flatly contradicted by the record here. The verdict of the jury, as to allowing damages on account of the shipment from Aberdeen to Sheridan, was unwarranted by any evidence. The verdict was opposed to the special finding that there was no testimony showing that the falling and injury of the horses was due to any rough or unusual handling by defendant of the car.

Robert P. Parker, for defendant in error.

If the car was overcrowded, the train crew assisted in loading, and knew the fact, and the company could not escape liability. (Kinnick v. Ry. Co., 69 Ia., 670; Normile v. R. & N. Co., 69 Pac., 930.) The evidence amply sustains the verdict.

SCOTT, JUSTICE.

This action was brought in the district court of Sheridan County by the defendant in error as plaintiff against the

plaintiff in error as defendant to recover damages for injury to horses while in transit over plaintiff in error's line of railway alleged to have been sustained by reason of the negligence of the company. The case was tried to a jury and a general verdict returned December 13, 1906, in favor of Morris and against the company for the sum of \$295, as damages and interest thereon from October 16, 1905. At the same time the jury returned their separate answers to interrogatories which the court submitted to them as follows, viz.: "Int. 1. Was the car, containing plaintiff's horses, overloaded or overcrowded? Ans. No. Int. 2. Did the overloading or the overcrowding of the car in question cause, or contribute to, the falling or injuring of plaintiff's horses while in transit between Aberdeen and Sheridan? Ans. Not overcrowded or overloaded. Int. 3. Was it the duty of the plaintiff to go himself, or have someone else do so, along with the car of horses in question, while same was in transit between Aberdeen and Sheridan, to prevent his horses from falling and being trampled upon while in the car in such transit? Ans. No evidence to show. Int. 4. Was the falling or the injuring of plaintiff's horses, while in transit between Aberdeen and Sheridan, due to any act of negligence or want of care of defendant? And, if so, state specifically in what such negligence or want of care consisted and also state by whose testimony or by what evidence such negligence or want of care of defendant has been shown. Ans. Bad order car and delayed train. By defendant's witness and all others. Int 5. Was the falling or injury of plaintiff's horses, while in transit between Aberdeen and Sheridan, caused by any rough or unusual handling of the car containing such horses, and if so state specifically where such rough and unusual handling occurred and by whose testimony or by what evidence such fact is established. Ans. No testimony." A motion by the company for judgment on the special findings, as also a motion for a new trial, was overruled, and the company brings the case here on error.

1. The company assigns as error the overruling of its motion for a new trial. It is contended, first, that the evidence is insufficient to support the verdict; second, that the verdict is contrary to law; third, that it was entitled to judgment upon its motion therefor upon the special findings.

It is admitted in the pleadings that plaintiff in error is and was a railroad company operating a line of railroad at the time of the shipment of the horses from Billings, Mont., to St. Louis, Mo., and a common carrier transporting merchandise and live stock for hire, and that it received a car load of horses from the defendant in error as such common carrier and undertook to transport them over its line to their destination.

There was conflicting evidence upon the question as to whether the car was overloaded or overcrowded. The jury, as seen by their special finding number one, found that it was not, and in view of the conflicting evidence upon that question such finding cannot be disturbed. The jury having so answered the first interrogatory, it follows that their second finding is correct, for if there was no overloading or overcrowding of the stock in the car it is apparent that the injury to the animals cannot be attributed to that cause.

The evidence tended to show that upon the plaintiff's application the company on the 16th day of October, 1905, furnished him a car on its side track and at its loading pen at Aberdeen, Montana, for the purpose of shipping a car load of horses from that point to East St. Louis. The car was loaded about eleven o'clock at night and shortly thereafter it was switched from the side track and attached to a freight train in rear of forty-seven car loads of lumber, and next forward of the caboose. The car had a broken draw-bar on the front end, and was coupled to the car in front by a chain, there being about eighteen inches of slack which was not taken up by the chain. The train was equipped with air brakes, which were coupled on to the

damaged car. The boiler of the engine was foaming and the train was overloaded, so that in climbing Parkman Hill in going south from Aberdeen the train crew had to divide the train and it was hauled in separate sections up that hill. The train was also delayed by having to wait at meeting points and did not reach Sheridan, a distance of forty miles from the starting point, until some time between 12:30 and 2:30 in the afternoon of the next day. Upon arrival at Sheridan the car was allowed to stand in the yards from one and a half to one and three-quarter hours before the horses were unloaded. It was then found that eight of the horses had been injured by having fallen in the car and having been trampled upon, one dying shortly thereafter; three were in such condition that they could not be shipped further and the remaining four were reloaded with the rest. The three left in the stock yards at Sheridan were afterwards sold by the company, and the other four so injured were sold by the shipper at their destination at prices much below what they would have brought had they been free from injuries. At Newcastle, Wyoming, the horses were again unloaded for water and feed, and with the exception of those left at Sheridan none were missing from the shipment. The horses were again reloaded and upon arrival at Alliance, Nebraska, it was found that one horse was missing. The door of the car was discovered to be partly open and the bull board down.

Neither the owner nor anyone in his behalf accompanied the horses to care for them and attend to their needs between Aberdeen and Sheridan, and this fact was known to the conductor who was in charge of the train. No contract of shipment was signed at the initial point nor at the time of delivery and acceptance of the horses by the company for transportation. The shipment, with the exception of the four head left at Sheridan, was accompanied from that point by a Mr. Towns as agent for the shipper, and upon leaving Sheridan he signed a shipping contract as agent for his principal. The contract so signed pur-

ports to be dated at Parkman station on October 16, 1905, and the number of head of horses as stated therein is thirty-eight. There was evidence on behalf of the defendant tending to show careful handling and management of the train, and the jury by their answer to interrogatory number five found that there was no testimony to show that the injury to plaintiff's horses between Aberdeen and Sheridan was due to any rough or unusual handling of the car.

It was incumbent upon the company to furnish a car properly equipped to safely transport the horses to their destination and it was liable for injuries resulting from a failure to do so. (5 Am. & Eng. Ency. of Law (2d Ed.), 432; 6 Cyc., 440.) It is conceded that the car which was furnished had a broken draw-bar, and it is not shown that the plaintiff was cognizant of that fact, nor was it his duty to inspect the car. (Union Pac. Ry. Co. v. Rainey, 19 Colo., 225; Mason v. Mo. Pac. Ry. Co., 25 Mo. App., 473; Gulf, &c., Ry. Co. v. Trawick, 80 Tex., 270; 5 Am. & Eng. Ency. of Law, 435.) According to the evidence on behalf of the plaintiff, there was eighteen inches of slack between the car in which the horses were and the next car ahead which was not taken up by the chain with which the coupling was made, and there was evidence tending to show that there would be more jarring and unsteadiness of the car by reason of such slack and consequently a greater tendency of the horses to get down in the car and be trampled upon than if the car had been properly equipped in this respect. One of the witnesses for the defendant, who at the time was superintendent of the division of defendant's railroad on which the injuries occurred, testified that any defect in a train might cause more jarring and that a defective draw-bar would be a serious defect.

The length of time consumed by the train in going from Aberdeen to Sheridan, a distance of forty miles only, and the delay in reaching the latter point was properly before the jury as bearing upon the question of proper equipment.

to handle the train and transport the animals with reasonable dispatch to where they could be unloaded and cared for. While it is not every delay that entitles a shipper to damages, yet if such delay was by reason of negligence of the company and contributed to the injury, it constituted a proximate cause and an action for damages would lie. The overloading an engine or a defective engine which causes a delay is evidence of negligence (Cleveland, &c., R. Co. v. Heath, 22 Ind. App., 47 (53 N. E., 198); Mich. So., &c., Ry. Co. v. McDonough, 21 Mich., 165 (4 Am. Rep., 466); McCreary v. R. Co., 109 Mo. App., 567 (83 S. W., 82), and if such negligence contributed to the injury there is no reason why damages should not be recoverable.

Negligence *per se* was not shown, but there was evidence sufficient to go to the jury and, therefore, sufficient to sustain a finding of negligence. It was for the jury to say from all the evidence whether such negligence constituted the proximate cause of the injury to the animals and by their special finding number four they found the proximate causes to be "bad order car and delayed train." If the damaged car and the delay in transit increased the hazard and risk of injury to the horses by getting down and being trampled upon, and injury also resulted in inability to unload the animals at an earlier hour, this court cannot say that the jury's finding is wrong. It would seem reasonable that the longer they were in transit and the consequent delay in getting those up which had fallen, together with the character and kind of animals, and their need of care and attention should all be taken into consideration in determining whether such delay contributed to and was a proximate cause of their injury. This was a question of fact for the jury to determine and we are of the opinion that the special finding number four is not contrary to the evidence, and that it is sustained by sufficient evidence.

It is contended that the verdict is contrary to law, and in support of this contention it is argued that the plaintiff was guilty of contributory negligence in failing to go or

send someone along with the horses and attend to their needs and wants during transit between Aberdeen and Sheridan; and also that, owing to the natural propensities of the horses and their liability to injure each other, the injuries must be attributed to such propensities or vice and that the company, by the terms of the contract, was not liable therefor.

The contract of shipment provided that the company should furnish free transportation for the owner or his agent to accompany the horses, and that he or his agent should have sole charge of the car and horses, and that the company should not be responsible for such attention and care.

The evidence is that the plaintiff and a stock inspector, together with the train crew, loaded the horses at Aberdeen. The plaintiff testifies that after loading them he left the car and horses in charge of the train crew. The evidence of the conductor who was in charge of the train is to the effect that he knew he was not carrying anyone on the part of the plaintiff to care for the horses between Aberdeen and Sheridan.

The existence of the contract was one of fact and was admitted by the parties. The rights, duties and obligations created thereby were questions of law to be determined by the court. There was some evidence of a custom of stockmen to accompany or send someone along to care for their stock while in transit, but the shipment was under the terms of an express contract, and the rights of the parties must be measured thereby. A custom to that effect and a failure to comply therewith was not pleaded. The jury by their answer to interrogatory number three stated that there was no evidence to show that it was the duty of the plaintiff to go, or have someone else do so, along with the car of horses while same was in transit between Aberdeen and Sheridan to prevent his horses from falling or being trampled upon while in the car in such transit. This question, we think, is one of law and not of fact, and that it was, therefore, im-

properly submitted to the jury, and its answer thereto—that there was no evidence—cannot be regarded as prejudicial to the defendant for that reason. That this was a question of law was recognized by the court in its instruction to the jury as follows: “You are instructed that the duty of looking after the horses in question, while on the way between Aberdeen and Sheridan devolved on the plaintiff. Hence, if he allowed such horses to be transported between those points, without going along himself or having someone do so, to look after them on the way and some of them got down and were injured because of such want of care, he cannot recover in this action.” In another instruction the jury were told that, in order for the plaintiff to recover for injury to his horses, he must affirmatively prove by a preponderance of the testimony that they were injured alone through the negligence of the company. The failure of the plaintiff to accompany or send someone along to care for his horses under the verdict and finding of the jury neither contributed to nor was it the proximate cause of the injuries.

If the injuries to the horses were due solely to their vices and natural propensities, then the company was not liable therefor, but in order for this to be a defense it must appear that such vices or propensities constituted the sole proximate cause of the injuries. (5 Am. & Eng. Ency. of Law, 445.) It is true that the evidence shows that horses of this character are nervous and excitable, and would be more liable to get down in the car for the first hundred miles of the journey and that that fact was known to the shipper as well as the company. The jury did not find that the natural propensities or vices of the animals was the sole proximate cause of the injuries, and upon the whole evidence it was for them to determine what the proximate cause of the injuries was (Gibson v. National S. S. Co., 8 Misc. Rep. N. Y. Super. Ct.), 22), and to have been the proximate cause, as a defense, the injuries must have occurred by reason of the natural propensities alone or in conjunction with some innocent cause (Chicago, &c., R. Co. v. Harmon,

12 Ill. App., 54), and the burden was upon the company to show that fact. (5 Cyc., 469.) The jury by their special finding found the proximate cause of the injuries to have been bad order of car and delayed train. We do not think that the injuries could upon the evidence have been the result solely of the natural propensities of the animals either alone or in conjunction with an innocent cause, for the damaged car and delayed train were not nor could they be considered an innocent cause. We are of the opinion that the verdict is sustained by sufficient evidence and that it is not contrary to law.

2. It is urged in argument that the court erred in refusing to permit the defendant to show that it was the custom to attach carloads of stock at the rear end of the train. The motion for a new trial does not specify this ruling as a ground therefor, unless it be included in the general ground defined in the statute and alleged in the motion as "errors of law occurring at the trial." The ground is too general and indefinite and upon the record it does not affirmatively appear that the specific question here argued was brought directly to the lower court's attention. (Boburg v. Prah, 3 Wyo., 325.) While it may have been argued and submitted to that court, the only way of showing that fact and presenting the question for review is by setting out and specifying in the motion the particular error and matter complained of. (Sec. 853, Elliott on App. Proc.)

3. It is assigned as error that the court erred in overruling the company's motion for judgment on the special finding of facts.

The interrogatories were submitted to the jury to be answered and returned with their general verdict in pursuance to the provisions of Section 3656, Revised Statutes 1899. Section 3657, Revised Statutes 1899, is as follows: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly."

The right to a judgment upon the special finding of facts under these provisions of the statute is limited to those cases where there is an inconsistency between the special finding and the general verdict, and unless there is such an inconsistency as to be irreconcilable such a motion should be denied. (*Davis v. Turner*, 69 O. St., 101, 116.) The special finding of facts is reconcilable with the general verdict, and that being the case the company was not in a position to ask affirmative action on the part of the court upon its motion for judgment based upon such finding.

4. The correctness of the instructions is not here questioned, nor is the right to recover the value of the horse which was lost from the car between Newcastle and Alliance seriously questioned. There was some conflicting evidence as to whether the horse was loaded with the others, but that was a question for the jury, and if so loaded the condition of the door at the time the horse was found to be missing would be sufficient evidence to sustain the verdict on the ground of negligence on the part of the company in failing to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping. (*Smith v. New Haven, &c., R. Co.*, 12 Allen (Mass.), 531; 90 Am. Dec., 166; *Pratt v. Ogdenburg, &c., R. Co.*, 102 Mass., 557; *Indianapolis, &c., R. Co. v. Strain*, 81 Ill., 504; *Betts v. Chicago, &c., R. Co.*, 92 Ia., 343; *Central of Georgia R. Co. v. James*, 117 Ga., 832; *Root v. New York, &c., R. R. Co.*, 83 Hun, 111.)

5. It is urged that the damage awarded by the jury is excessive. The damage was variously estimated by different witnesses and the amount found by the jury was within the evidence and does not exceed the value placed upon the animals in the contract of shipment and to which value the plaintiff limited the amount of his recovery for injury to or loss of the horses while in transit. The argument upon this question seems to be that a recovery, if at all, must be for the value of the horse which was lost from the car, and that there was no liability for damage for injury

to the horses while in transit between Aberdeen and Sheridan. This contention, as we have seen, is not correct, for the plaintiff was entitled to recover for injuries to them as well. We are of the opinion that the damage assessed by the jury is not excessive. No prejudicial error appearing in the record, the judgment will be affirmed. *Affirmed.*

POTTER, C. J., and BEARD, J., concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY v. POLLOCK.

PLEADING—AMENDMENT TO CONFORM TO PROOF—APPEAL AND ERROR—
RAILROADS—COMMON CARRIERS—TRANSPORTATION OF LIVE STOCK—
DELIVERY—LOADING—LIABILITY FOR LOSS—CONFLICTING EVIDENCE—
CREDIBILITY OF WITNESS—PROVINCE OF JURY.

1. Where an amendment to a pleading might have been allowed to correspond with the facts proven, a judgment will not be disturbed because no formal amendment was made.
2. Recovery being sought for an alleged failure of a carrier to transport two out of a number of horses alleged to have been delivered, the petition alleged that the defendant, through a named employee, loaded the horses upon defendant's cars. *Held*, that such averment would not prevent a recovery for a loss of the horses between the time of delivery and loading, it appearing from the evidence that defendant was not misled, and the petition, if its interpretation was doubtful, might have been amended to conform to the facts.
3. The liability of a carrier as such commences at the time of delivery and acceptance of the property for shipment.
4. By the acceptance on the part of defendant carrier of a delivery for transportation of plaintiff's horses, then in a pen of defendant's stock yards, the latter became liable from that time as carrier, notwithstanding that prior to such delivery plaintiff's horses were held in the pen subject to his personal control, under an arrangement with a third party having the temporary use of the yards for a public horse sale.

(11)

5. Though the plaintiff had for a time been using a pen in the stock yards of defendant carrier for holding his horses, with personal control over them, neither he nor the carrier was prevented by that fact from changing the situation, and entering into an arrangement for the delivery in the same pen of the horses for transportation. Whether such a change was accomplished was a question of fact for the jury.
6. Where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in the performance of the act, notwithstanding a stipulation in the contract of shipment requiring the loading to be done by the shipper.
7. It is the province of the jury to pass upon conflicting evidence as to the number of horses delivered to a carrier for shipment, and the credibility of witnesses is especially a matter for their consideration.

[Decided February 10, 1908.]

(93 Pac., 847.)

ERROR to the District Court, Sheridan County, HON. CARROLL H. PARMELEE, Judge.

F. G. Pollock sued to recover from the Chicago, Burlington & Quincy Railroad Company, for the loss of two horses which, it was alleged, the company had failed to transport as a common carrier according to contract. From a judgment in favor of plaintiff, the defendant prosecuted error. The facts are stated in the opinion.

Lonabaugh & Wenzell and *N. K. Griggs*, for plaintiff in error.

Though the bills of lading, mistakenly issued by the agent without any personal knowledge on his part, show 56 horses, that only 54 went into the cars is proven, (1) by the evidence of Dodge, who did the loading and who alone speaks as to this; (2) by the admitted facts that none escaped or could have escaped from the cars, yet 54 head only were found at the unloading at Alliance; (3) by the statement of plaintiff himself, who, after having gone with the horses to Alliance, said that he had no reason to think

that any of them got out of the cars on the way there; (4) by the explicit finding of the jury that the 2 horses in question were neither loaded into nor escaped from the cars. But, should we concede that the 56 horses were actually in pen No. 23, on the evening of the day of shipment, this would not aid plaintiff, for then the result would be that 2 of them escaped, or were taken from his pen, where, under the decisions, he, and not defendant, had to take the chance of loss, as the pen was not under the control of defendant, but of another, and plaintiff's horses while therein were subject to his disposal. (R. R. Co. v. Riley, 27 A. & E. R. R. Cas., 49; R. R. Co. v. Hunter, 18 id., 527; R. R. Co. v. Powers, 103 N. W. (Neb.), 678; Ry. Co. v. Byrne, 100 Fed., 359.)

The misconduct of counsel, when the court sustained an objection to a question put on cross-examination to one of defendant's witnesses, in stating that if permitted he would prove it, was prejudicial, and entitles defendant to a new trial. The question was intended to reflect upon the witness, and the counsel's conduct was such as is held to entitle a party to a new trial even though the court at once does everything possible to nullify the effect of the wrong. (Nelson v. Welch, 115 Ind., 273; Cosselman v. Dunfee, 65 N. E., 494; People v. Davey, 72 id., 245; Cook v. Com., 76 id., 666; Bullard v. R. R. Co., 64 N. H., 323; Jaques v. R. R. Co., 41 Conn., 61.) Plaintiff has, by his pleading, narrowed this case to very small limits. The default he alleges against defendant is alone the latter's failure to transport. Indeed, his petition, in express terms, says that we did load the horses; it does not say that we did not do so, nor that they were lost before loading by any act of defendant. When the case came to trial, the issues changed entirely from those made by the pleadings. By the petition we were called upon to defend upon the ground that we had loaded the horses into the cars and then lost them. The case as made, and as specifically found by the jury, was not charged at all. In truth, there was no evidence whatever

even tending to support the negligence alleged against us, there being as to this an entire failure of proof. Upon the case made by the pleadings we were entitled to an instructed verdict in defendant's favor, the rule being universal that the proof must correspond with and support the default as alleged; hence it was error for the court to refuse the motion made for such instructed verdict.

Robert P. Parker, for defendant in error.

The evidence establishes a delivery of 56 horses, and the agent made out the contract for that number without plaintiff's assistance. It is true that petition alleges that defendant loaded the horses into the cars, but that allegation was made solely for the purpose of meeting the recitation in the contract of shipment that plaintiff should load and unload, and to show that defendant had waived that obligation on part of plaintiff by itself loading the car, and thus exempting plaintiff from the consequences of a negligent loading. (*Normile v. R. & N. Co.*, 69 Pac., 930.) The question of variance was fully presented to the court below, and defendant held not to have been misled. The alleged misconduct of counsel was not preserved by being stated as a ground in the motion for new trial, and cannot, therefore, be here considered. The plaintiff, a shipper, having shown delivery to the defendant, a common carrier, and having shown a loss, the carrier is liable unless it brings itself within the excepted causes or exception by contract. (6 Cyc., 519.)

POTTER, CHIEF JUSTICE.

The defendant in error, who will be referred to as the plaintiff, his title in the district court, brought this action to recover the value of two horses, alleged to have been delivered to and received by the plaintiff in error, defendant below, to be transported by it, as a common carrier, from Sheridan, in this state, to Hammond, Indiana, under two separate contracts, or bills of lading, each providing for the

transportation of twenty-eight horses, and it is alleged that, in violation of the defendant's said contracts, it failed to transport the whole number of horses as thereby agreed respectively, but that it transported from Sheridan twenty-seven horses only of the number covered by each contract. The answer alleges that twenty-seven horses only were in fact delivered and received under each contract, and that the number was mistakenly entered in each as twenty-eight in consequence of plaintiff's erroneous statement to the defendant respecting the number. The principal issue to be tried, therefore, was whether the two horses in question had been delivered and received for such shipment.

That the defendant is a common carrier, operating a railroad running through Sheridan County, in this state, is admitted by the pleadings. It appears from the evidence that there was but a single delivery of horses for the shipment aforesaid, that is to say, all the horses then proposed to be shipped by the plaintiff were delivered at one and the same time, but they were loaded into two cars, and a separate contract was made for the horses in each car. The plaintiff owned all the horses and was named as consignee in each contract, and as the shipper in one of them. In the other contract one W. P. Palmer was named as shipper, and his name is subscribed to that contract. That appears to have been done to enable said Palmer to accompany the plaintiff with the horses, he having been employed, as plaintiff testified, to assist with the horses after their arrival at destination. This seems to explain the reason for the making of two contracts instead of one. They are alike in their terms except as to the name of the shipper and the number of the car containing the horses. Each contract contains the following stipulation: "It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party (the carrier) shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or

to each other, or which results from the nature or propensities of such animals." It is also stated in each contract that, in consideration of free transportation for one person to accompany the stock, "it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the railway company shall not be responsible for such attention and care." The sum of \$121 is stated in each contract and alleged in the petition as the freight rate to be paid for the agreed transportation.

Notwithstanding the stipulation in the contracts as to loading the animals, the petition alleges and the evidence shows that the loading was done by an employee of the defendant, the foreman of its stock yards at Sheridan, the point of shipment; and from the evidence it appears that such loading occurred during the absence of the plaintiff. The discrepancy between the number of horses stated in the contracts and way-bills and the number actually in the cars was noticed when the train carrying the horses reached Alliance, Nebraska, on the defendant's railroad. The horses were unloaded there during the night of their arrival and but twenty-seven were found to be in each car by the foreman of defendant's stock yards at that point, who assisted in unloading them, and the next morning, the horses having remained there until then, the plaintiff saw and counted the horses and discovered the discrepancy between the number stated in the contracts and which he claims to have been delivered, and the number being transported. He thereupon at once made and filed a claim for the alleged missing horses with the defendant's representative at Alliance, which was referred to the defendant's freight claim agent. Thereupon some correspondence occurred between the latter and the plaintiff, resulting in an offer of settlement at a stated figure by said claim agent, but which offer plaintiff did not accept. That correspondence was introduced in evidence. Whatever the loss or escape, therefore, it occurred, if at all, be-

fore the unloading of the horses at Alliance, so far as the evidence is concerned.

The jury returned a general verdict for the plaintiff, assessing the damages at \$160, with interest; and with their verdict returned answers to certain special interrogatories that had been submitted at defendant's request. Answering the special interrogatories, the jury found that the two horses in controversy had not escaped from defendant's cars; that they were in the same pen at the stock yards with the other horses at the time the plaintiff directed or authorized the loading of his stock into defendant's cars; and that they escaped or were lost between the time of turning over the stock to defendant and the loading into defendant's cars, through the negligence of defendant's employees.

A motion for judgment in favor of defendant, notwithstanding the verdict was denied, and thereafter defendant's motion for new trial was also denied; whereupon judgment was rendered for the plaintiff upon and in accordance with the verdict for the sum of \$203.30, that being the amount of damages assessed by the jury, with legal interest from the day next succeeding the execution of the contracts and the alleged delivery of the horses, together with costs of suit. The defendant complains here of that judgment on error.

The following grounds of error are relied on in the brief of counsel for the defendant, plaintiff in error here:

1. That the evidence fails to establish the cause of action alleged.
2. That the evidence fails to show negligence on the part of defendant.
3. That plaintiff is not shown to be entitled to recover.
4. That the court erroneously excluded from the evidence the official report of the sheriff's inspection of the horses shipped by the plaintiff.
5. Alleged misconduct of plaintiff's counsel during the trial.

1. It is contended in the first place that upon the allegations of the petition and the special findings of the jury the plaintiff is not entitled to recover anything. This conten-

tion is based upon the finding that the horses were lost or escaped between the time that they were turned over to defendant and the time that they were loaded, which is claimed to be inconsistent and at variance with the allegation of the petition that the horses were loaded upon the cars of the defendant by an employee of defendant. In the cause of action upon one of the contracts, after alleging the delivery and acceptance of twenty-eight horses for transportation, it is alleged "that said defendant, through its employee, one Gill Dodge, loaded said horses upon the cars of said defendant." In stating the cause of action upon the other contract a similar allegation appears. The breach of each contract is alleged to have been the failure to transport and convey the horses in accordance with its said contracts. Upon this it is argued that negligence before or during loading is not charged, and that the verdict appears, therefore, to have been founded upon a liability not alleged in the petition. One of the grounds contained in the motion for new trial was that of surprise based on the facts aforesaid, and an alleged lack of advice and knowledge on the part of the defendant that an attempt would be made to show negligence prior to the loading of the horses.

A literal reading of the allegation as to loading might perhaps throw the petition open to the technical construction that it states that all the horses delivered had been actually loaded upon the cars of defendant. Though the contract stipulation requiring the shipper to load was not alleged, it is probable, as suggested in the brief for defendant in error, that the allegation that the horses were loaded by the defendant was inserted to show a waiver of the agreement in that regard; and that the intention was merely to allege that the act of loading was performed by the defendant instead of the plaintiff, and thus to open the way to recover for a loss shown to have occurred while the horses were being loaded. And this we are inclined to think is the sense in which the averment ought to be construed, in view of all the allegations of the petition. There is at least

no harm in adopting that construction, since it is clearly a matter that was capable of amendment without changing the cause of action, and the circumstances are such as to render the variance, if any, immaterial; a question that we will now proceed to consider. Recovery was sought for an alleged failure to transport two horses alleged to have been delivered and accepted for that purpose.

The statute provides that no variance between allegation and proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect the party has been misled, whereupon the court may order the pleading to be amended upon such terms as are just; and when the variance is not material the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. (Rev. Stat. 1899, Secs. 3736, 3737.) When the allegation to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, then it is not a case of variance, but a failure of proof. (Id., Sec. 3738.) Where an amendment might have been allowed to correspond with the facts proven, a judgment will not be disturbed because no formal amendment was made. (Kuhn v. McKay, 7 Wyo., 42.)

Now, the whole transaction, including the circumstances of the delivery of the horses, the time of such delivery, the number of the horses when taken in charge by the defendant, and when loaded, the method employed in loading, the chances of escape after the time plaintiff claimed to have made the delivery, and apparently everything connected with the transaction as well before as after the alleged delivery, was gone into by both parties upon the trial. Defendant's representative in receiving and loading the horses was a witness for the defendant, and he was examined at length concerning the entire matter. The district court

must have taken these facts into consideration in deciding the motion for new trial; and we fail to observe any reasonable ground for holding the defendant to have been misled by the allegation referred to, or any ground for assuming that it could have more fully presented its case or the facts to meet a claim of liability at any time following the alleged delivery.

Moreover, the instructions given to the jury, apparently without objection, presented the case as one for an alleged liability between the time of delivery and leaving Sheridan. For example, the fourth instruction charged the jury that "in no view of the case can plaintiff be held to recover in this action for the horses in question, or either of them, unless he shall have established by preponderance of the evidence, that he absolutely did deliver such horses, or horse, to defendant for actual shipment." Now, there could be no question about delivery after the loading. The sixth instruction stated that under the petition no question is raised as to loss or escape at any other point than Sheridan, and that the jury were not at liberty to find against defendant because of any evidence tending to show the loss or escape of the horses at any point other than Sheridan. None of the other instructions sought to distinguish between a loss before and after loading. The defendant complains of the refusal to give its requested instruction number seven, but it is not in the record, and we are in no way informed as to what was stated by it. Should there be any reasonable doubt, therefore, as to the interpretation of the allegation in question, we think it is clearly one which the court might have ordered to be amended to conform to the facts; and that the alleged variance was not of such a character as to amount to a failure of proof.

2. The evidence was conflicting in regard to the number of horses delivered. Each contract or bill of lading called for twenty-eight, as well as each way bill; these were made out by the agent of defendant at Sheridan, and the plaintiff testified that he did not state the number to the agent, and

there was no evidence that he made any statements or representations as to number to such agent. He did testify, however, that he had fifty-six horses, and that he delivered all of them to the defendant for shipment; and he introduced in evidence the sheriff's certificate of inspection made at or about the time of the alleged delivery, showing the inspection of fifty-six horses for the plaintiff, "destination Hammond, Ind., shipped car 61357, 52585 Q." According to the contracts and way bills, the cars containing the horses were numbered 61357 and 62585. The sheriff may have made a clerical mistake in the number of one of the cars, or the mistake may be in the copy in the bill of exceptions. However, the discrepancy is not material to the controversy here, since there is no evidence of any other shipment at the time in question, and the discrepancy does not seem to have been mentioned at the trial.

At the time that plaintiff claims by his testimony to have delivered the horses for shipment, they were, whatever their number, in one of the pens at defendant's stock yards at Sheridan, the particular pen being numbered 23 adjoining the loading chute or pen, or rather separated therefrom only by an alley sixteen feet wide, a gate of the same width as the alley when closed separating the pen from the alley.

It appears that during several days immediately preceding this shipment a public horse sale had been conducted at said stock yards by one A. B. Clarke, who had been given the use of the stock yards for that purpose, except that the company reserved the right to use portions thereof if necessary for the unloading of animals from its cars while passing through Sheridan, and possibly for horses turned over to it at that point for shipment. While Mr. Clarke was using the yards as aforesaid, he or his agents allotted a certain pen or pens to respective buyers, into which the horses bought from time to time by them were put. Under this arrangement the plaintiff was assigned the temporary use of pen 23, and the horses purchased by him were placed in that pen. During such sale, however, and while the pens

were so used, that is to say, as a place for keeping the horses purchased, the pens so employed were under the exclusive control of the person conducting the sale, or his agents, so far as the company was concerned, and the horses might be taken out and others put in, without control or interference by the railway company. The plaintiff testified that he bought fifty-six horses, obtaining all but one at the sale aforesaid, and that the one not so obtained was bought from a party in Sheridan and put in the same pen with the others; that at about six o'clock in the evening of the day of shipment while such horses were in the pen aforesaid, he counted them, and there were fifty-six; that he then turned them over to the company for said shipment, and the company accepted them. That he thereupon went into town to attend to some business, returning at about seven o'clock, when he was informed by the agent that they had loaded his horses, and he was given the bills of lading. It does not appear that he made any further count of the animals that day.

The representative of the company who loaded the cars testified that he loaded all the horses that were in the pen used by plaintiff sometime between seven and nine o'clock in the evening; that he drove the horses out of the pen 23 into the chute pen, counting them as they passed through the gate into the alley connecting with the chute pen; that there were fifty-four head, which he divided into two lots of equal number, and loaded them in separate cars. He stated that the night was dark and rainy, and that he used a lantern, but he believed he was able to make a correct count. He denied giving the number of horses to the agent, or to having any knowledge as to where the agent obtained his information respecting the number. It appears from his testimony that the officer who inspected the horses was there at the time he commenced loading, and though he admitted having known at some time that fifty-six were claimed to have been inspected, and seems to have gained that information from the officer, he was unable to recall

whether or not he had learned that fact at the time of the loading, but admitted that the officer may have told him at that time. He had the key to the outside gate of the yards, and testified that he did not let anyone out with any of the plaintiff's horses after they had been turned over to him, and that he did not think it was possible for any of the horses to have escaped or to have been stolen while being loaded.

In addition to the testimony of the plaintiff above mentioned, he was recalled on rebuttal and then testified that the representative of the company to whom he had delivered his horses was the foreman of the stock yards, the witness who testified to having done the loading; that the horses were in the pen aforesaid when so delivered, and that the delivery occurred immediately after he had received the certificate of inspection. It appears that the inspection was made by a deputy sheriff, and the plaintiff testified that upon his return from town when he found the contracts prepared and ready for signature, the inspecting officer was with the agent, which may perhaps account for the agent's information as to the number of horses.

Neither the party who was agent at the time nor the officer who made the inspection appears to have been called as a witness or to have testified. But an affidavit, or apparently a portion of one, made by the absent officer was permitted to be read by consent, subject to objection as to relevancy. In that affidavit which was offered by defendant it was stated that after the date of the shipment the affiant saw in a stable at Sheridan one of the animals claimed by the plaintiff to have been shipped and lost, but there is nothing in the evidence to connect the plaintiff with the act of placing the animal there, or to show that he knew of its having been there.

Though the witness who had attended to the loading stated that the company had nothing to do with the horses while in pen 23, it appears from his own testimony that they were in that pen when he took charge of the horses as the company's representative, for he testified that he drove the

horses out of the pen in loading them. The evidence showing that before the loading the plaintiff left the yards, and that he did not return until the loading had occurred is not disputed. It is clear, therefore, since he left the horses in the pen where they had been kept, and they were loaded without further act on his part, that it is a reasonable conclusion that they had been delivered before he left the stock yards, and, therefore, while in the pen. Though the company would not have been liable under the circumstances for losses had any occurred during the period that the horses were kept in the stock yards before actual delivery and acceptance for shipment, the fact that others previously had the temporary use of the yards does not exempt the company from liability as a common carrier after accepting possession for the purpose of transportation. The liability of the carrier as such commences at the time of delivery and acceptance of the property for shipment. (5 Ency. L. (2d Ed.), 181, 446; Hutchinson on Carriers (2d Ed.), Sec. 82.) In a recent Nebraska case the rule was stated to be well established as follows: "When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches." (Chicago, B. & Q. R. Co. v. Powers, 103 N. W., 678.) Notwithstanding, therefore, that the horses had been kept in the yards one or two days or more under conditions during that period imposing no responsibility upon the carrier, when, if ever, though without change of location, the horses were actually surrendered into the possession and control of the carrier, and the latter so accepted them for transportation, the previous facts became of no consequence, except as bearing upon the question of the time of delivery, and when the liability as carrier began. It is clear that, although the plaintiff had for a time been using a pen in the yards of the company for holding his horses, with personal control over them, neither he nor the company was prevented by that fact from

changing the condition of affairs, and entering into an arrangement for the delivery in the same pen of the horses for transportation. Whether such a change was accomplished was a question of fact for the jury to determine.

The testimony of the defendant's superintendent at Sheridan at the time of the shipment, does not, as contended, establish the fact that this particular lot of horses could not have gone into the company's possession until they were in the chute or loading pens. It does not appear by his testimony or otherwise that he gave any personal attention to this shipment. His testimony was directed generally to the arrangement with Mr. Clarke in relation to the use of the yards during the sale; and he stated that as no shipments had been previously booked for those days he had turned over the yards to Clarke for the purposes already stated, and that, in case of a proposed shipment while Clarke had control of the yards, the company would then have arranged with him about that, so as not to interfere with his sale. And in referring to the matter generally the witness stated that the company had nothing to do with the horses connected with the Clarke sale when they were put into the various pens, nor until their going into the chutes or loading pens, but that until then they could be handled in any way, driven away or shipped, and when put into the loading pens, they were then loaded in the car for the company. In making these statements it is clear that he was not referring specifically to this particular shipment, but to the situation generally resulting from the use of the yards for the Clarke sale. He was not examined about the specific facts connected with the delivery of plaintiff's horses, nor does he appear to have been present or to have had any personal knowledge about that delivery. Had there been an absence of any evidence tending to show a surrender of possession to the company before the horses entered the loading pens, the general situation would no doubt have controlled. We do not think his testimony or the facts testified to by him rendered it impossible for a delivery to

have occurred while the horses were in pen 23. The testimony of the plaintiff and the foreman of the stock yards presented the facts to the jury respecting this particular shipment, and the time and manner of delivery therefor, a matter not touched upon specifically by the superintendent's testimony. Whether the Clarke sale had been closed at the time of this shipment is not clearly disclosed, though the inference is strong that it had. At any rate, it would seem that the plaintiff's connection with the sale had ceased, and that he was prepared to arrange for the shipment of his horses.

There was some evidence to the effect that one horse bought by plaintiff at the Clarke sale had been put into another pen, and had been seen in the neighborhood of Sheridan after the shipment, but plaintiff testified to having rejected that horse and to have excluded it in stating the number of horses he had purchased; moreover, it appears to have been a different animal from either of the two alleged to have been missing. Under the contracts, which seem to have been completed and signed after the loading, the shipper agreed to load and unload; but the defendant voluntarily did the loading, and under such circumstances as to constitute a waiver of the contract stipulation, so far as to render it liable for negligence on its part in performing the act if resulting in loss or damage. We understand the rule to be that where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in performance of the act, notwithstanding a stipulation in the contract requiring the loading to be done by the shipper. (*Normile v. R. & Nav. Co. (Ore.)*, 69 Pac., 928; *C., B. & Q. R. Co. v. Williams (Neb.)*, 85 N. W., 832 (55 L. R. A., 289); *Norfolk & W. R. Co. v. Sutherland*, 89 Va., 703; *Mo. Pac. R. Co. v. Kingsbury (Tex.)*, 25 S. W., 322.) The rule is certainly a reasonable one under circumstances such as are presented in the case at bar. It is not clear whether the special finding that the loss occurred between the time of

delivery and loading refers to the time when the loading was begun or completed. If the latter was intended, then the rule above stated would apply.

The instructions seem to have fairly presented the law upon the issues, and are not here complained of, but we refer to them to show how the case went to the jury. They stated in substance that if but twenty-seven horses were in fact delivered to the company to be placed in each of the two cars, then the fact that the contracts mistakenly stated that twenty-eight were shipped in each would be immaterial, and the case should then be considered as though the contract read twenty-seven instead of twenty-eight; that while the horses were under plaintiff's control in the pen mentioned in the evidence, they could not be regarded as delivered to defendant; that a recovery could not be had unless an actual delivery of the alleged missing horses to the defendant was established; that if the horses were in a pen belonging to defendant, but only for the convenience of plaintiff in holding them or otherwise, then they were not delivered to defendant so as to make it liable for loss or escape therefrom. By reason of the peculiar language of the petition in stating that the defendant transported only twenty-seven horses from Sheridan, the jury was instructed that no question was raised as to loss or escape at any point other than Sheridan.

The following instruction was requested by defendant:

"You are instructed that as the plaintiff has declared, in his petition, upon the contracts of shipment, and also himself introduced said contracts in evidence, he is bound by their terms; and hence, as said contracts expressly state, among other things, that the defendant shall not be liable for the escape from defendant's cars of the horses in question, you cannot render a verdict against it for damages, on account of such escape, even though you should be satisfied from the evidence that they did so escape."

This was modified by adding the following: "Provided, however, that such escape was made without negligence on

the part of the defendant or its employees," and as so modified was given. Though the modification was complained of in the motion for new trial, it is not shown to have been excepted to, and we do not understand that it is now claimed to have been error.

The evidence being conflicting upon the question of the number of the horses, it was the peculiar province of the jury to pass upon it; and they seem to have done so by harmonizing as much of the evidence as possible. It must be remembered that the contracts were in evidence, and they would control in the absence of evidence deemed sufficient to overcome their recitals. If the testimony of plaintiff was to be believed, then the contracts correctly stated the number. There were some other circumstances in evidence corroborative of his testimony. There were others opposing it; such as the improbability that more than twenty-seven head actually went into either car, and the testimony of the witness who loaded the horses that he found only fifty-four, and that he loaded all that were in pen 23. The jury may have thought it possible for the two to have escaped after delivery and inspection and before the beginning of loading; in which case the testimony of said witness, as well as the plaintiff, may have been given credence. Defendant's evidence tended strongly, if not conclusively, to show that no escape had occurred between Sheridan and Alliance, hence the instruction restricting the liability to loss at Sheridan does not seem to have eliminated any chances of plaintiff's recovery upon the evidence. Though conflicting, the evidence appears to be sufficient to sustain the verdict. We cannot substitute our judgment for that of the jury, even if we should feel inclined to look at the effect of the evidence differently. The credibility of the witnesses was especially a matter for the consideration of the jury. We are, therefore, of the opinion that the claim as to insufficiency of the evidence is not supported upon the record.

3. The other alleged errors are not properly before us, not having been assigned as grounds for new trial. But

we are inclined to think that the exclusion of the sheriff's office record and his monthly report as to the inspection of these horses, made by authority of Chapter 79, Laws of 1901, was proper, or at least not prejudicial. The purpose of the offer was to show that as appeared by such record and report only fifty-five horses had been inspected, excluding the rejected horse above referred to; and as a witness connected with the sheriff's office was permitted to state the fact shown by the record by referring to it, not to refresh his recollection, but by way of stating the total number shown by the record to have been inspected on the occasion in question, prejudice is not quite apparent. But the shipper and carrier have nothing to do with the making of the record or report; and it was not shown nor offered to be shown that the plaintiff against whom they were sought to be introduced was present when they were made or had assisted in making them, or knew until they were produced at the trial what the contents were. As written evidence for the purpose aforesaid upon the issues here between the shipper and carrier, they would appear to be objectionable on the ground of hearsay.

For the reasons aforesaid no reversible error is perceived in the record, and the judgment will be affirmed.

BEARD, J., and SCOTT, J., concur.

Affirmed.

WEIDENHOFT ET AL. V. PRIMM.

APPEAL AND ERROR—RECORD—ARRANGEMENT OF, AND NUMBERING PAGES—DISMISSAL—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—ESTATES OF DECEDENTS—PROCEEDING TO DETERMINE HEIRSHIP—APPEAL—WITNESSES—EVIDENCE—COMPETENCY—MARRIAGE—CONTRACT—SUFFICIENCY OF EVIDENCE TO ESTABLISH—PRESUMPTION OF MARRIAGE FROM COHABITATION—ILLICIT COHABITATION.

1. It is only after an order has been made requiring the rearrangement and numbering of the pages of the transcript and papers composing the record, and a non-compliance with such order, that the proceeding in error may be dismissed in the discretion of the court, for a non-observance of the rules as to arranging and numbering the pages of the record.
2. The motion for new trial is properly in the record, where a copy thereof appears in the bill of exceptions, which is properly certified by the judge as a true bill and made a part of the record, and the bill is enumerated in the clerk's certificate as one of the original papers filed in the case and transmitted to this court pursuant to the order requiring the original papers to be sent up.
3. A final judgment of the district court in a proceeding to ascertain and determine the heirship, ownership and interest of claimants to the estate of a decedent, under Sections 4835 and 4836, Revised Statutes 1899, is reviewable on error.
4. The provision of Section 4836, that "such determination shall be final and conclusive in the administration of the estate," does not prevent an appeal, but is to be construed as concluding the parties by a final determination in the proceeding, which, in case of an appeal, would only occur when finally decided in the appellate court.
5. One claiming to be the widow of a decedent is not a competent witness to prove marriage as against the mother and sister of decedent claiming as heirs, in a proceeding to determine the heirship to decedent's estate; but her testimony is competent where she is allowed to testify without objection, though in determining its weight the fact that the statute makes her an incompetent witness should be considered.
6. In a proceeding to determine heirship, one claiming to be the widow of decedent testified that after the decedent and herself had lived together as man and wife for some time

illicitly, a contract of marriage was entered into through the reading in their presence of the marriage ceremony of the Episcopal Church by one not authorized to perform the marriage ceremony, and each answering the questions appearing therein, but whether such questions were answered in the affirmative or negative was not stated; and when the claimant was asked as a witness if she then took the decedent as her husband and he took her as his wife, she testified, "We answered all the questions contained in the marriage ceremony of the Episcopal Church." Held, that such testimony was insufficient to establish a mutual contract of marriage, as the manner in which the ceremonial questions were answered could not be assumed.

7. Though, where a man and woman live together, treating each other as man and wife, hold each other out to the world as such, and so conduct themselves toward each other and the community as to gain therein a general and uniform reputation as being husband and wife, that is sufficient to create a presumption that they have been lawfully married, it does not directly or affirmatively establish a marriage. If satisfactorily proved and sufficiently strong, the facts may be legitimate ground for inferring a valid marriage.
8. When the cohabitation between a man and woman is shown to have been illicit in the beginning, the presumption is that it continues to be illicit until the contrary is established.
9. The general reputation in the community where they reside as to whether or not a man and woman who have lived together are or were man and wife is competent evidence on the question of their marriage; but to be of any value as evidence, such reputation must be general and uniform.
10. The evidence held insufficient to establish an alleged common law contract of marriage between a decedent and a claimant to his estate as widow, where it appeared that their cohabitation was confessedly illicit in the beginning and continued so for some time prior to the alleged contract; that the claimant had been held out as the wife of decedent the same before as after the alleged contract; that, though claimant testified to a reading by her mother in their presence of the Episcopal marriage ceremony and their answering all the questions, she did not state how the questions were answered; that, notwithstanding decedent usually introduced claimant as his wife, they were not generally or uniformly reputed to be married in the community where

they lived, but their relations were generally regarded as illicit; and other acts and declarations of the parties were shown inconsistent with a marriage contract.

[Decided March 9, 1908.]

(94 Pac., 453.)

ERROR to the District Court, Fremont County, Hon. CHARLES E. CARPENTER, Judge.

Upon a proceeding to determine heirship to the estate of Julius A. Schuelke, deceased, Lola Small Schuelke Primm claimed the estate as widow of the decedent, as against Emilie Weidenhoft, mother, and Johanna Schuelke, sister of the decedent. Judgment was rendered in favor of the former and the latter—the mother and sister—prosecuted error. The facts are stated in the opinion. The case was heard upon motion to strike the bill of exceptions and dismiss the petition in error, and also upon the merits.

E. H. Fourt, for plaintiffs in error.

The evidence is totally insufficient to establish a marriage contract between Dr. Schuelke, the deceased, and the defendant in error. While the latter was occasionally introduced by Dr. Schuelke as his wife, that was not usually so, and he refrained from so introducing her to respectable women of the community. She was not generally regarded as the doctor's wife, but their relations were generally understood to be illicit.

An alleged foreign marriage will not generally be presumed to be valid, without a showing of compliance with the laws of the country where it is alleged to have been performed. (*Canale v. People*, 52 N. E., 210; *Norcross v. Norcross*, 29 N. E., 506; *Medway v. Needham*, 16 Mass., 157 (8 Am. Dec., 131.) A marriage in the District of Columbia, where this contract is said to have been entered into, is void unless solemnized according to law. It is so held in Maryland, from which state the law of the District of Columbia on the subject was taken. (*Dennison v. Dennison*, 35 Md., 361; *Brown v. Becket*, 6 D. C., 253.) A

marriage invalid where entered into is invalid everywhere. (1 Bish. M. & Div. (6th Ed.), 390.) Cohabitation illicit in the beginning is presumed to have so continued until the contrary is proven. (Williams v. Williams, 46 Wis., 464; 1 Jones on Ev., 183; 1 Bish. M. & D., 504; Ededstein v. Brown (Tex.), 80 S. W., 1027; Sims v. Sims (N. C.), 28 S. E., 407; Riddle v. Riddle (Utah), 72 Pac., 1081.)

The statutes of this state seem to be mandatory in respect to procuring license to marry, and preclude the idea of a marriage, except when celebrated in the manner prescribed. A license *must* be obtained. (McLaughlin's Est. (Wash.), 30 Pac., 651; Ligona v. Buxton (Me.), 2 Greenl., 102; Com. v. Munson, 127 Mass., 459; Norcross v. Norcross, 29 N. E., 506; State v. Hodgkins, 19 Me., 155.)

Presumption of marriage from cohabitation and reputation is overcome by evidence of a separation. (Maher's Est. (Ill.), 56 N. E., 124.) The doctrine that a marriage resulted from contract of marriage *per verba de futuro* followed by cohabitation did not become a law of this state by the adoption of the common law of England. (Cheney v. Arnold, 69 Am. Dec., 609; Burtis v. Burtis, 14 Am. Dec., 563; Dennison v. Dennison, *supra*.) A mere contract of marriage was not a complete marriage, unless made in the presence of or with the intervention of a minister of Holy Orders. (2 Pars. Cont. (5th Ed.), 75, 78.)

Stone, Winslow & Gudmundsen and *H. S. Ridgely*, for defendant in error.

There is no provision of law for the bringing of error proceedings in this cause; the decision of the district court is by statute made final and conclusive, and this court is without jurisdiction. (R. S. 1899, Secs. 4835-4837; 88 Cal., 374; 17 Ency. L., 1060, *et seq.*; Wilson v. Ter., 1 Wyo., 114; Mau v. Stoner, 14 Wyo., 183; Const., Art. V, Secs. 2, 18.) The proceeding to determine heirship is a special proceeding for the settlement of estates of deceased persons, and the provisions of the code of civil procedure

relative to new trial, and error proceedings, are inconsistent and inapplicable. (26 Ency. L. (2d Ed.), 1; *Smith v. Westerfield*, 88 Cal., 374; *Ex parte Smith*, 53 Cal., 204; *Bell v. King*, 70 N. C., 330.) No provision regulating or allowing appeals applies to this proceeding. The bill of exceptions is not prepared, arranged and fastened together in proper order, and the pages of the same are not properly numbered as required by law and the rules of this court. The motion for a new trial is not embraced in the bill. There is no certificate of the trial court, or any officer thereof, that it is any part of the record in this case, and the same does not appear ever to have been filed in the district court, and is not certified by the clerk to be a part of the record. A motion for a new trial is not a part of the record unless incorporated in a bill of exceptions properly prepared, allowed and signed. (*Seibel v. Bath*, 5 Wyo., 409; *Harden v. Card*, 14 Wyo., 479.) The omission is such as cannot be amended. An appellate court will not permit a bill of exceptions to be withdrawn for the purpose of amendment or correction as a matter of course; and especially is this true where the mistake or omission is due to the laches of the party seeking relief. (*Callahan v. Houck*, 14 Wyo., 201; *Freeburgh v. Lamoureux*, 13 Wyo., 454.) The bill is not certified by the clerk to be the original bill of exceptions settled and allowed by the judge of the district court. It is sufficient as to this to call attention to the certificate of the clerk of the district court, and to the absence of any statement over his signature which would identify the bill of exceptions in the files of this court, with the bill settled and allowed and made a part of the record in the district court.

In the pleadings it is alleged that Emilie Weidenhoft was the mother and Johanna Schuelke the sister of the said Julius A. Schuelke, deceased, but there is no evidence that such was the fact. It is true that in the court below, for the purposes of the hearing, and so far as it affected the rights and interests of the defendant in error, she admitted

that the plaintiffs in error stood in the relationship claimed by them. But such admission was not binding upon the court, and could not be taken by the court in lieu of proof; neither was the admission sufficient, in the absence of positive evidence, to justify the court in making a finding in their favor; it could not be taken by the court as a substitute for the necessary proof of identity. The burden was upon the plaintiffs in error to establish their identity and relationship. (14 Cyc., 98; Hall v. Wilson, 14 Ala., 295; Anson v. Stein, 6 Ia., 150; Currie v. Fowler, 28 Ky., 145; Taylor v. Whiting, 4 T. B. Mon., 364; Emerson v. White, 29 N. H., 482; Morrill v. Otis, 12 N. H., 466; Birney v. Hann, 10 Ky., 322; Freeman v. Loftus, 51 N. C., 524; Goldwater v. Burnside, 22 Wash., 215.) We submit that plaintiffs in error here having failed to make sufficient proof, and there being no finding in their favor upon the evidence as to relationship, the court below cannot be held to have committed error in refusing to render judgment for them.

There existed between the defendant in error and the decedent a valid common law marriage, such as could only be terminated by death or a judicial decree; as such wife, upon his death, she became, under the law of descent of this state, the person to whom all of the estate of the said decedent should be distributed, had he died intestate, and she is entitled to take the same under the terms of the will. A direction to distribute "under the intestate laws" is a gift to a class. (McGowan's Est., 190 Pa. St., 375; 30 Ency. L., 718.) Taking under the will, the defendant holds by purchase and not by descent. (Allen v. Bland, 134 Ind., 78.)

A formal valid marriage will be presumed from cohabitation, acknowledgment and reputation. (19 Ency. L. (2d Ed.), 1202, 1204, and cases cited; Teter v. Teter, 101 Ind., 129.) The essentials are capacity and consent. A contract of marriage *per verba de praesenti* is valid. (Connors v. Connors, 5 Wyo., 433; Fornshill v. Murray, 18 Am. Dec., 344; 1 Bish. M. & D., 116.) A marriage established by

evidence is presumed to be regular and valid. (26 Cyc., 57; *Green v. Norment*, 5 Mackey, 80.) A marriage may be proved by circumstantial or presumptive evidence. (26 Cyc., 62, 68; *Pierce v. Jacobs*, 7 Mackey, 498; *Senge v. Senge*, 106 Ill. App., 140; *Jennings v. Webb*, 8 App. Cas. (D. C.), 43.) And by one of the parties thereto. (*In re Richards*, 133 Cal., 524; *Com. v. Dill*, 156 Mass., 226; *Leighton v. Sheldon*, 16 Minn., 243.) In the absence of any positive provision declaring that all marriages not celebrated in the manner prescribed shall be void, it is generally held that a marriage without conformity to such regulations is valid if the parties have entered into the contract according to the common law. (19 Ency. L. (2d Ed.), 1195, and cases cited; 26 Cyc., 20; *Connors v. Connors*, 5 Wyo., 433.) This marriage was contracted in the District of Columbia, and it may be of importance to observe that the common law is in force there, except in so far as it has been abrogated by act of Congress. (*DeForrest v. U. S.*, 11 App. Cas. (D. C.), 458; *State v. Cummings*, 33 Conn., 260; *U. S. v. Griffen*, 6 D. C., 53; *U. S. v. Guiteau*, 1 Mackey (D. C.), 498; *Ex parte Watkins*, 7 Pet. (U. S.), 568.) The common law of another state must be presumed to be the same as it is in the state of the forum, in the absence of evidence to the contrary. (10 Cent. Dig. Col., 864, and cases cited.) This state has adopted the common law. (R. S. 1899, Sec. 2695.) It will be presumed that the legislature in enacting a statute did not intend to make any alteration in the common law other than that specifically stated. (*Cadwallader v. Harris*, 76 Ill., 370; *Hooper v. Baltimore*, 12 Md., 464.) No provision of the law of Wyoming makes void marriages not celebrated in accordance with the statutory procedure. Under our law marriage is made a civil contract. (Sec. 2955.) Upon the authorities it would seem to be clear that a common law marriage is valid in the courts of this state, if the contract is proved to have been made either in the District of Columbia or in the State of Wyoming.

With reference, then, to the evidence: Marriage, like other contracts, may be proved by any species of evidence not prohibited by law which does not presuppose a higher species of evidence within the power of the party. (*Beaudieu v. Ternoir*, 5 La. Ann., 476.) To constitute a marriage good at common law, an express agreement between the parties to take and live with each other as husband and wife is not necessary. The agreement to do so is implied from their acts and conduct in mutually recognizing and holding each other out as bound together in the matrimonial state, and proof of such acts and conduct is proof of the marriage agreement. (*Renfrow v. Renfrow*, 60 Kan., 277.) The presumption arising from an illicit cohabitation in the beginning is rebuttable. (26 Cyc., 73.) It may be rebutted by direct evidence or by proof of circumstances from which a subsequent marriage can be inferred. (*Id.*; *Caujolle v. Ferrie*, 23 N. Y., 90; 26 Barb., 177; *Wilcox v. Wilcox*, 46 Hun, 32; *Travers v. Reinhardt*, 205 U. S., 424; *Elzas v. Elzas*, 171 Ill., 632; 2 *Wigmore's Ev.*, 2082-3; *Eversley Dom. Rel.*, 41; *White v. White*, 82 Cal., 427; *Badger v. Badger*, 88 N. Y., 546; *State v. Worthingham*, 23 Minn., 528; *Adger v. Ackerman*, 115 Fed., 124; *Univ. v. McGuckin*, 62 Neb., 489.)

Plaintiffs in error complain that the defendant in error does not state how the questions were answered by Dr. Schuelke, "whether in the affirmative or in the negative." There is, however, no room for uncertainty as to the fact—the "ultimate fact" that the parties then and there "mutually consented to a social relation," and this consent when established is just as effective whether evidenced by affirmative words or by "clear and unambiguous conduct." The evidence is ample as to the necessary facts to establish the marriage. A marriage entered into by contract between parties in one state, and followed by cohabitation and recognition of the relation in another state, is valid and binding. (*Goodrich v. Cushman*, 34 Neb., 460; *Gibson v. Gibson*, 24 Neb., 394; *Travers v. Reinhardt*, 205 U. S., 424.)

E. H. Fourt, for plaintiff in error, in opposition to the motion to strike and dismiss, contended that the judgment was appealable, and cited, in addition to various constitutional and statutory provisions as to appeals and the jurisdiction of the supreme court, the following cases: *Norman v. Curry*, 27 Ark., 440; *Simpson v. Simpson*, 25 Ark., 487; *State v. Johnson*, 103 Wis., 591; *Anderson v. Matthews*, 57 Pac., 156; *Bank v. Ranch Co.*, 5 Wyo., 55; *Payne v. Davis*, 2 Mont., 381; *Sutherland on Stat. Const.*, 440, 567; *Martin v. Hunter*, 1 Wheat., 304. That the motion for new trial is properly in the bill and the bill properly certified.

BEARD, JUSTICE.

The defendant in error filed her petition in the district court of Fremont County, in the matter of the estate of Julius A. Schuelke, deceased, under the provisions of Section 4835, Revised Statutes 1899, to determine the heirship to the deceased, she claiming to be his widow and sole heir, and as such entitled to the residue of his estate upon final settlement. The plaintiffs in error appeared and contested her claim and denied that she was the widow of deceased, and alleged that Emilie Weidenhoft, one of the plaintiffs in error, was the mother of deceased, and that Johanna Schuelke, the other plaintiff in error, was his sister, and that they were the sole and only heirs at law of said deceased. There was but one issue in the case, and that was whether the defendant in error was the lawful wife of Julius A. Schuelke at the time of his death. The case was tried to the court without a jury, and the court found that the defendant in error was the wife of said Julius A. Schuelke at the time of his death, and as his widow would be entitled to all of the property of his estate in the hands of the administrator, subject to the payment of the debts of said estate and costs of administration, and entered a decree accordingly. From that decree the plaintiffs in error bring the case here on error.

The defendant in error has filed a motion to strike the bill of exceptions from the files and to dismiss the proceed-

ings in error. The motion to strike the bill is based upon several grounds, viz.: that the pages are not properly arranged and numbered; that the motion for a new trial is not embraced in the bill; and that the bill is not properly certified. This part of the motion has not been seriously urged in oral argument and is not well taken. It is only after an order has been made requiring the rearrangement and numbering of the pages of the transcript, and that order has not been complied with, that the cause may be dismissed in the discretion of the court. (*Harden v. Card*, 14 Wyo., 479, on p. 497.) No such order was applied for or made in this case. A copy of the motion for a new trial appears in the bill of exceptions, and the bill is properly certified by the judge as a true bill, was filed and became a part of the record in the case, and is enumerated in the certificate of the clerk as one of the original papers filed in the case and transmitted to this court in pursuance of the order directing him to send up the original papers filed in the case. It is the certificate of the court or judge to the bill of exceptions that identifies the motion for a new trial therein contained as the motion ruled upon, and the certificate of the clerk can neither add to nor detract from the recitals contained in the bill. In this case the petition in error was filed July 27, 1907, and the motion to strike the bill was filed November 11, 1907. The bill was not filed until November 14, 1907, and it is at least doubtful if the motion can be considered as applying to the bill filed. The motion to strike the bill will be denied.

The motion to dismiss the petition in error is based upon the language of Sections 4835 and 4836, Revised Statutes 1899. Those sections are as follows:

"SEC. 4835. In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in

the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made."

"SEC. 4836. Upon the filing of such petition, the court or judge shall make an order directing service of notice to all persons interested in said estate to appear and show cause, at the first day of the next ensuing term of the court held in the county where said order is made, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, as the court or judge may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainty to a common intent, and requiring all said persons, and all persons named or not named having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action, upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property. The court shall enter an order or decree establishing proof of the service of such notice."

It is contended that the language, "and such determination shall be final and conclusive in the administration of said estate," refers to the determination of the question in the district court and makes the judgment of that court final, from which no appeal can be taken; and that, therefore, this court is without jurisdiction. It is argued that

as our code of probate procedure is taken from the California statutes, and that Sections 4835 to 4837, inclusive, are taken verbatim from Section 1664 of the California code, omitting only the provisions contained in the California statute for motion for new trial, and for proceedings in error or appeal; and that this omission clearly indicates an intention on the part of our legislature to cut off the right of appeal and to render the decision of the district court final. An examination of Section 1664 of the California code discloses, however, that it contains the identical language contained in Section 4836 of our statutes, viz.: "and such determination shall be final and conclusive in the administration of said estate," and then in the same section provides for the trial of the issues as in civil action, "with like right to a motion for a new trial and appeal to the supreme court," etc. We think it fair to assume that the legislature of California did not intend to declare in the first part of the section that the judgment of the trial court should be final and conclusive and then in a subsequent part of the same section provide for an appeal to the supreme court. It is undoubtedly true that our code of probate procedure was taken from the California statutes. Some things were omitted, and in other instances, such as the matter now under consideration, a change was made in the division of the law into sections and in arranging those sections under appropriate headings. As originally adopted by the first state legislature, it was Chapter 70, Laws 1890-1, now Division 4, Revised Statutes 1899. In that division, which (with subsequent amendments) contains our law of probate procedure, we find in Chapter 3, embracing Sections 4542 to 4557, inclusive, under the head of orders, decrees, process, minutes, records, trials and appeals, the following provisions:

"SEC. 4550. Except as otherwise provided in this division, the provisions of the code of civil procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this division.

"SEC. 4551. The provisions of the code of civil procedure, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this division—apply to the proceedings mentioned in this division.

"SEC. 4552. If no jury is demanded, the court must try the issues joined. * * * Either may move for a new trial on the same grounds and errors, and in like manner, as provided by law for civil actions."

These provisions clearly give a party the same right to appeal from the judgment of the district court in probate proceedings as in civil actions, unless the provisions of Section 4836, above quoted, takes away that right. That it was not intended to and does not do so we think is evident. The provisions of Sections 4835 to 4840, inclusive, were intended to provide an additional, more adequate and complete method of determining heirship to one dying intestate, and the rights of all parties claiming to be heirs or entitled to distribution in whole or in any part of such estate, than was otherwise provided by law. It authorizes any person so claiming to commence the proceeding at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, although the estate might not be in condition for distribution at that time; and provision is made for bringing in all parties, whether they have appeared or not, and all parties are required to appear and exhibit their respective claims of heirship, ownership or interest in the estate. As said in *In re Burton*, 93 Cal., 459, it was the intention "to provide a mode of proceeding by which *all persons who claim ownership* of or an interest in the property of an estate of a testator or an intestate, whether directly, as heirs and devisees, or indirectly, through the heirs or devisees, may have their rights and interests in and to such property conclusively ascertained, determined and declared, so far at least as the parties before the court are concerned, before distribution is decreed, to the end that the final distribution of the property may be made directly to the persons respectively entitled

thereto." It is the determination in such a proceeding of the *rights of all persons claiming an interest in the estate* that the statute makes final and conclusive, and not the judgment of the district court. In *Blythe v. Ayres*, 102 Cal., 254, the court said: "Section 1664 was clearly intended to provide the means by which, where there are hostile claimants to an estate, *all* the conflicting rights thereto may be summarily and finally determined in one proceeding." And in *In re Blythe*, 110 Cal., 231, in commenting upon this section, the court said: "It was intended to construct a wider, better and more just and effective method of determining heirship to one dying intestate, where there are many conflicting claimants of such heirship. It gives a longer time and affords ampler opportunities to contestants to present and litigate their claims, than they formerly had when the ordinary decree of distribution was conclusive; and we have no doubt that the legislature intended by said section to make the decree under it conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow." These decisions clearly show the construction placed upon the language, "and such determination shall be final and conclusive," by the supreme court of California; and that is that when the question has once been litigated to a final determination in such a proceeding (which could only be in this court if either party appealed) it binds all parties and is final and conclusive as to the persons entitled to distribution and their respective rights, and those questions shall not be relitigated upon final distribution or in any other proceeding. In that construction we concur. This view is in harmony with the provisions of Section 4838, which is as follows: "Nothing in sections four thousand eight hundred and thirty-five, four thousand eight hundred and thirty-six and four thousand eight hundred and thirty-seven contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title or interest in the estate so distributed, where the same shall not have

been determined under the provisions of said sections; but when such question shall have been litigated, under the provisions of said sections, the determination thereof as therein provided shall be conclusive in the distribution of said estate."

Counsel for defendant in error contend that the decision in the case of *Mau v. Stoner et al.*, 14 Wyo., 183, is decisive of the question here presented. But we do not think that decision is applicable in this case. That was a proceeding for the appointment of a water distributor, was summary in notice, temporary in character, and to meet an immediate emergency. It was not an action or proceeding to determine the title or ownership of property; but, on the contrary, for the preservation of the rights of the parties temporarily; and the statute there construed expressly declared that the decision of the *district court, judge or commissioner* should be final. (State ex rel. *Mau v. Ausherman*, 11 Wyo., 410, pp. 432-3.) And it was held that in such a proceeding the legislature had the power to and did make such judgment final and that an appeal would not lie to this court; and that the amendment allowing an appeal from the judgment of the commissioner or judge to the district court still left the judgment of that court final. For the reasons above stated we are of the opinion that the matter is appealable, and that this court has jurisdiction. The motion to dismiss must, therefore, be denied.

We come now to a consideration of the only issue presented to the district court involved here, viz.: was the defendant in error the lawful wife of Julius A. Schuelke at the time of his death? She bases her claim solely upon an alleged verbal contract of marriage which she claims was entered into between herself and the deceased, March 17, 1901, at Washington, D. C.; and it is upon that alleged contract that her case must stand or fall. At the time of his death, which occurred August 7, 1903, Julius A. Schuelke was a practicing physician residing in Fremont County, this state. For a number of years prior to December 12, 1900, he was a

married man, and on the date last mentioned his then wife procured a decree of divorce from him in the district court of said Fremont County. From the uncontradicted evidence of the defendant in error it appears that she was with Dr. Schuelke in Wyoming in 1899, but in what capacity or what their relations were does not appear, but she states that she did not then live with him as his wife. That after that time and prior to March 17, 1901, she lived with him as his wife in the Philippine Islands, where he was an officer in the army. That they returned to the United States in March, 1901, and from August of that year up to the time of his death she lived and cohabited with him as his wife at Thermopolis, in said Fremont County. She testified that they had just returned from Europe and were at her mother's in Washington on March 17, 1901, and were thinking of coming west. That her mother objected to her going unless they were married. That "Dr. Schuelke objected to such formalities of that kind." That her mother then "got a prayer book and read the marriage service, which the doctor agreed to, and we then entered into an agreement and were married. From that time I considered it such and so did he." Elsewhere in her testimony, in speaking of their relations to each other, she says, she "objected and often spoke of a civil marriage, which he would not have because he said he did not care for it." In answer to the question, "At that time when you entered into this particular relation with him, did you there at that time take him as your husband and he take you as his wife?" she said: "Why, we answered all the questions that were contained in the marriage ceremonies of the Episcopal Church." She testified that her mother was not an officer authorized to perform the marriage ceremony, and in answer to the question, "Is your mother an ordained minister?" she answered: "No, indeed, she is not. We had one minister in the family and we thought that was sufficient." She also testified that the doctor always introduced her as his wife to people in Thermopolis and also at Washington, and

that she transacted business for him as his wife. Two letters from the doctor to her were introduced in evidence, the envelopes being addressed, "Mrs. Julius A. Schuelke," one bearing date at Philadelphia, Pa., May 5, 1901, and the other Lost Cabin, Wyo., March 25, 1902. In one he addresses her as "My Dear Lola," and closes it with "Yours affectionately." In the other she is addressed as "Dear Lola," and it closes with "Yours faithfully." Also a letter from the doctor to her father, dated November 24, 1902, the envelope being addressed, "Sam W. Small, Esq." In the letter it is addressed to "My Dear Chaplain," and closes with, "I am as always your sincere friend." A photograph of the doctor was introduced, on the back of which is written, "To Mrs. Major Julius A. Schuelke, from her husband, the man who adores her at any and all times. She liked him particularly in this costume and he always appealed to her in uniform." She states that soon after they came to Thermopolis he was going through a trunk and found this photograph which he had had taken in Cuba and gave it to her and wrote that on the back of it, and that she was the person referred to. Two witnesses for defendant in error testify that the doctor introduced her and held her out as his wife. One of these witnesses testified that on one occasion, when the doctor and this woman were traveling overland in August, 1901, the doctor invited him to go out to their camp and meet his wife. The witness then says: "I asked him if he was married. He said he was. I said, 'When did you get married, doctor?' He says, 'Early last spring.' I says, 'Where?' He says, 'In Washington City.'" That they then walked to the camp and the doctor introduced the defendant in error as Mrs. Schuelke. On the other hand, two witnesses testified that at one time she stated that they were going to Chicago and were going to be married. Another witness states that she told him in 1902 that they were not married, that she wanted the doctor to marry her, but he would not. These conversations she denies. The witness also testified that he said to the doctor,

"I always supposed you were married," and that he replied, "Yes, a common law marriage; that is all." That the doctor told him that his (doctor's) mother had asked him, before their return to the United States, who this woman was, and he told her she was his common law wife.

It is also in evidence that she and the doctor had quarrels, at which times he called her the most vile names, told her he would give her a short time in which to leave, that "she had no string on him, and that she had bled two or three men, but she could not bleed him any." Several witnesses, both men and women, testified that the defendant in error was not regarded as the doctor's wife; that the general impression among the people of the community was that they were not husband and wife; that her reputation for chastity and virtue in Thermopolis was bad. There is also evidence that her reputation for truth and veracity in the community was bad. Some of the witnesses stated that she was generally reputed to be his mistress. The evidence also shows, without contradiction, that in November, 1902, she left the doctor and went to the State of Montana, and there, in her presence and with her knowledge and consent, was registered at a hotel as the wife of another man and occupied the same room at the hotel with him. One witness testified that the doctor told him that he first met her in Cuba and that she followed him up until he couldn't get away from her. The will of Dr. Schuelke, bearing date July 30, 1902, which had been admitted to probate, was introduced in evidence. By the terms of the will he revoked all former wills, and particularly one made in favor of Elsie M. Schuelke, formerly his wife, then divorced, and directed all of his property to be distributed upon his decease in such manner as the laws of the state of his residence might provide. The defendant in error is not mentioned or in any way referred to in the will. The foregoing summary, we think, is a fair statement of the material portions of the evidence as it appears in the record.

From the evidence in this case there can be no question as to the character of the relations between these parties

prior to March 17, 1901. According to her own testimony, she was 26 or 27 years of age and he was about 40 years old. They lived together as man and wife in the Philippines without any pretense that a marriage, contract of marriage or even a promise of marriage existed between them. Their illicit relations were entered into voluntarily and were continued, at least until their return to the United States, with a full knowledge that they were illicit. Whatever took place in Washington on March 17, 1901, if anything in fact occurred, looking to a change in their relations from meretricious to matrimonial was not occasioned by the desire of either for such change, but on account of the objections of her mother to her coming west unless they were married. But, notwithstanding this modest request of the mother, the doctor, not only then, but ever afterwards, objected "to such formalities," and refused to have any marriage ceremony performed and thus acknowledge her as his lawful wife in the manner provided by law. Granting all that she says occurred in the presence of her mother, we think it fails to establish a mutual contract of marriage. (*Hantz v. Sealy*, 6 Binn., 405; *McKenna v. McKenna*, 180 Ill., 577.) Aside from her statements of conclusions, that they entered into a contract and were married, all that her testimony amounts to is, that her mother read the marriage ceremony of the Episcopal Church and that they answered the questions. The service was not read by an authorized minister or officer, the prayer book was not put in evidence, nor does it appear how they answered the questions, whether in the affirmative or negative. And when she is asked the direct question if she at that time took Dr. Schuelke as her husband and he took her as his wife, she evades a direct answer and says: "Why, we answered all the questions contained in the marriage ceremony of the Episcopal Church." But there is no warrant for assuming that the questions, if they had been in evidence, were answered in one way more than in another. The mother of the defendant in error (the only competent living witness as to

what occurred between the parties in Washington) was not called as a witness nor was her testimony taken; and no reason for not doing so appears in the record. The defendant in error was a party to the proceeding, and the adverse parties defended against her claim and claimed on their own behalf as heirs at law of the deceased. She was, therefore, an incompetent witness as to what occurred between her and the deceased under the provisions of Section 3683, Revised Statutes 1899. (*Ullman v. Abbott*, Adm'r., et al., 10 Wyo., 97; *Sorensen v. Sorensen*, 56 Neb., 729; *In re Estate of Maher*, 210 Ill., 160; *Matter of Brush*, 25 N. Y. App. Div., 610; *Hopkins v. Bowers*, 111 N. C., 175.) No doubt had objection been made to her competency as a witness to testify to such transactions, her testimony would have been excluded by the district court. But no such objection was made and the evidence, in the absence of such objection, was competent although the witness was not. (*State v. Hughes*, 106 Ia., 125; *Coles v. Shepard*, 30 Minn., 446; *Hoog v. Wright*, 174 N. Y., 36; *Cribbin v. Jarvis et al.*, 67 Pac., 531.) The fact, however, that the statute makes her an incompetent witness should be considered in determining the weight to be given to her testimony.

Much reliance is placed by counsel for defendant in error upon the fact that the parties lived together as husband and wife and that he introduced her as such and addressed letters to her as Mrs. Julius A. Schuelke. That they lived together as man and wife both before and after the alleged contract of marriage is beyond dispute; but we do not think it at all strange that a man who has brought a woman into a community and has introduced her as his wife, would when away address letters to her in that way. But in none of the letters introduced does he address her or speak of her as his wife or of himself as her husband. He addresses her father as "My Dear Chaplain." In his will she is not mentioned either by name or as his wife. That one witness testified that the doctor said he was married in Washington City last spring is not entitled to much weight in determining

the actual relations of the parties when taken in connection with the testimony of another witness that he stated that a common law marriage was all that existed between them, and that he had told his mother, before their return to the United States and at a time when their relations to each other were knowingly and confessedly illicit, that she was his common law wife; and especially when it also appears by uncontradicted testimony that after the date of the alleged marriage contract he called her the most vile names imputing unchastity, told her he would give her a short time in which to leave, that she had no string on him, and that she had bled two or three men, but she could not bleed him. It is undoubtedly true that where a man and woman long live together, treating each other as man and wife, hold each other out to the world as such, and so conduct themselves toward each other and the community as to gain in the community a general and uniform reputation as being husband and wife, that this is sufficient to create the presumption that they have been lawfully married. "But neither such a course of life nor such declarations make a marriage, nor do they even directly or affirmatively establish it. They may, if satisfactorily proved and sufficiently strong, be legitimate ground for inferring that there has been a valid marriage." (Arnold v. Chesebrough, 46 Fed., 700. See also Cartwright v. McGown, 121 Ill., 388; 2 Am. St. Rep., 105; McKenna v. McKenna, 180 Ill., 577; Clayton v. Wardell, 4 N. Y., 230.) To be evidence of marriage the cohabitation must not have been illicit in the beginning. When the cohabitation is clearly shown (or as in this case confessed) to have been illicit in the beginning, the presumption is that it continues to be illicit until the contrary is established. (Barnum v. Barnum, 42 Md., 251; Brinkley v. Brinkley, 50 N. Y., 184; Imboden v. Trust Co., 11 Mo. App., 220; White v. White, 82 Cal., 427; Powers v. Executors of Charmbury, 35 La., 630; Williams v. Herrick, 21 R. I., 401; Badger v. Badger, 88 N. Y., 546 (42 Am. Rep., 263); Cartwright v. McGown, *supra*; 26 Cyc., 879, 889; 19

Ency. Law, 1206.) In the case at bar it is admitted that the cohabitation of the parties as husband and wife in the Philippines was meretricious; and the fact that they continued such cohabitation after the alleged contract of marriage does not of itself overcome the presumption that such relations continued to be meretricious. The general reputation in the community where the parties resided as to whether or not they are husband and wife is competent evidence as tending to prove marriage. It is in the nature of a verdict of the community upon their relations, arrived at from observing their conduct, their manner of life, their deportment toward each other and the community, and their declarations. It is the general impression or belief created in the minds of the people from those things which constitutes the general reputation which may be shown in evidence as tending to raise the presumption of marriage, or the contrary. To be of any value as evidence, such reputation must be general and uniform. (*White v. White, supra*; *Arnold v. Chesebrough, supra*; *Jackson v. Jackson, 82 Md., 17*; *Barnum v. Barnum, supra*.) In the case before us there is no evidence that the parties were generally reputed to be man and wife; but, on the contrary, the evidence is that they were not generally so regarded and that the general impression among the people was that she was not his wife, but his mistress. It is true that there is evidence that he held her out and introduced her as his wife, and lived with her as such; but that does not seem to have satisfied the people of the community generally that she was such in fact. During the time she claims to have been the wife of Dr. Schuelke she knowingly permitted herself to be registered at a hotel as the wife of another man and occupied the same room with him. This is inconsistent with her claim that she was at that time the lawful wife of Dr. Schuelke, and tends to show that she did not so regard herself. Several witnesses testified that her reputation in Thermopolis for chastity and virtue was bad, and two witnesses testified that her reputation for truth and veracity

was also bad, and no witness testified to the contrary. There is very little direct conflict in the evidence in this case—that is, there are but few facts testified to by the witnesses on the one side which are denied or directly contradicted by the witnesses on the other side. The important question is, what is the correct conclusion to be drawn from all of the evidence in the case? We think the learned judge of the district court must have given undue weight to the evidence of cohabitation of the parties and that she was introduced and held out by Dr. Schuelke as his wife, and must have overlooked the presumption arising from their former illicit relations and the further fact that their conduct, manner of life and declarations failed to create in the minds of the people of the community the general impression or belief that they were in fact husband and wife.

Upon a consideration of all of the evidence, and with due regard to the finding and conclusion of the district court, we are impelled to the conclusion that the defendant in error has failed to establish her claim to be the lawful widow of Julius A. Schuelke, deceased. This conclusion renders it unnecessary to consider whether such a contract of marriage as the defendant in error claims was entered into, if proven, would constitute a valid marriage between the parties.

The judgment of the district court is reversed, and the case will be remanded to that court with directions to vacate and set aside the decree heretofore entered and to enter a decree adjudging the defendant in error not to be the widow of said deceased and not entitled to any part of his estate upon final distribution. *Reversed and remanded.*

POTTER, C. J., and SCOTT, J., concur.

RIORDAN ET AL. v. HORTON ET AL.

APPEAL AND ERROR—PETITION IN ERROR—AMENDMENT—ASSIGNMENT OF ERROR—CONSTRUCTION OF STATUTE LIMITING TIME FOR BRINGING PROCEEDING IN ERROR—CONFLICTING EVIDENCE—RECEIVERS—COMPENSATION—WAIVER—PREMATURE ALLOWANCE—WAIVER OF QUESTION NOT RAISED IN BRIEF.

1. There being no statute specially regulating amendments in proceedings in error, the matter of such amendments should by analogy be determined as near as may be according to the provisions of the civil code with reference to amendments of pleadings and proceedings in district courts.
2. By analogy to the provisions of the civil code forbidding an amendment of a pleading changing substantially the cause of action, an amendment of a petition in error by substituting a different judgment for the one originally complained should not be permitted.
3. The judgment complained of being erroneously referred to in the petition in error as rendered at the "March term," but being otherwise sufficiently identified, and the record disclosing but one judgment which was rendered November 20, 1905, and a motion for new trial which was submitted and decided at the following March term of the trial court, it is proper to permit an amendment by inserting the true date and term of the judgment.
4. The period having elapsed within which an original petition in error could be filed, an amendment is not permissible substituting as a ground of error the overruling of the motion of plaintiffs in error for a new trial in place of an allegation "that the court erred in overruling the motion of plaintiffs in error in said cause."
5. A party may assign as error one or more grounds embraced in the motion for new trial, and thereupon be entitled to have those matters reviewed, without specifically assigning as error the overruling of the motion for new trial.
6. As to all matters which must or should be embraced in a motion for new trial as a condition to their consideration on error, the statute limiting the time for bringing proceedings in error begins to run from the date of the ruling upon the motion for new trial.
7. The evidence being conflicting as to whether a receiver, who was a stockholder of the concern placed in his charge, had

agreed, in order to obtain the consent of the other stockholders to his appointment, to give his services as receiver without compensation, the finding of the trial court that he was entitled to compensation will not be disturbed.

8. There being no statute fixing the fees or compensation of receivers, a statement filed by a receiver at the time of his appointment waiving the statutory fees and consenting to abide the order of the court or judge as to the amount of his compensation does not deprive him of the right to receive any compensation, but, in connection with evidence that a supposed statutory fee of ten per cent was agreed by the receiver when appointed to be excessive, its effect is to limit the compensation to what may be reasonable and just, the same in no event to equal or exceed a commission of ten per cent.
9. A question not raised in the brief of plaintiff in error will be deemed to have been waived or abandoned.
10. Though partial allowances from time to time for services rendered are proper, neither the whole nor any part of the compensation of a receiver accrues or becomes a charge upon his trust until the services have been rendered, and an order entered before final report showing a settlement of all matters intrusted to the receiver fixing the amount of his compensation as in full for all services rendered and to be rendered is premature, and therefore erroneous.
11. A stockholder of a bank having been appointed receiver thereof, with the consent of the other stockholders, upon the understanding that when the work was completed the court would fix a reasonable fee for his services, which should depend as to amount upon the outcome of the bank's affairs, *Held*, that though such understanding would not preclude the court from allowing partial compensation from time to time for services rendered less than the value thereof, to allow him his entire compensation prior to his performance of the required services and the approval of his final report would be unfair to the stockholders, independent of the general rule forbidding an allowance before the services are performed.

[Decided March 9, 1908.]

(94 Pac., 448.)

ERROR to the District Court, Weston County, HON. CARROLL H. PARMELEE, Judge.

The material facts are stated in the opinion.

Metz, Sackett & Metz and *N. K. Griggs*, for plaintiffs in error.

It is proper to permit the petition in error to be amended as to any matter contained in the record, proper to be considered on error. (*R. R. Co. v. Ingalls*, 13 Neb., 279; *Spencer v. Thistle*, 13 Neb., 201; *Robinson v. Kilpatrick*, 50 Neb., 795; *Hildebrant v. Brewer*, 5 Tex., 566; *Ry. Co. v. Bailey*, 7 O. St., 88; *Humphries v. Spafford*, 14 Neb., 488; *Bazzo v. Wallace*, 16 Neb., 293; *Scott v. Spencer*, 44 Neb., 93; *Darries v. Darries*, 58 Mo., 222.)

The receiver's compensation could not legally be allowed without notice to the plaintiffs in error, the parties chiefly interested as owners of a majority of the capital stock of the bank. (*Alderson on Rec.* (Ed. 1905), 859; *Bank v. Chrysler*, 67 Fed., 388, 390; *Jorelman v. McPhee*, 76 Pac., 922; *Hayden v. Trust Co.*, 55 Ill. App., 241; *Bank v. Frankenthal*, 55 Ill. App., 400.) The proper time for the allowance of compensation is at the close of the receivership; and until that time full compensation will not be made, and the allowance will not be made without proof. (*Maxwell v. Mfg. Co.*, 82 Fed., 214; *In re Pelican Saw Mill Co.*, 19 So., 686.)

In view of the evidence as to the understanding of the parties at the time of Horton's appointment, the allowances were excessive in the extreme. The evidence strongly supports the theory that he was to receive no compensation, and that would be the usual rule, since he was a stockholder and volunteered his services. (*O'Brien v. Harriman*, 1 Tenn. Ch., 467; *Barry v. Jones*, 27 Am., 742; *In re Cooper*, 93 N. Y., 507; *In re Hopkins*, 32 Hun, 619; *In re Hodgeman's Est.*, 35 N. E., 660; *Bassett v. Miller*, 8 Md., 551; *Walford v. Powers*, 85 Ind., 294; *Soc. v. Brumfield*, 102 Ind., 146; *Kellar v. Orr*, 106 Ind., 406; *Polk v. Johnson*, 65 N. E., 537; *Steel v. Halladay*, 25 Pac., 77; *Ross v. Conwell*, 34 N. E., 752; *In re Mulligan's Est.*, 27 Atl., 398; 12 Ency. L. (2d Ed.), 1286; *Beach on Trustees*, Sec. 748; *In re Est. of Davis*, 4 Pac., 22; *Bate v. Bate*, 11 Ky., 639;

McCaw v. Blewit, 2 McCord's Eq., 90.) But upon the theory that he was entitled to full compensation the amount allowed is excessive. (Schwartz v. Oil Co., 25 Atl., 1019; Spears v. Thomas (Ky.), 70 S. W., 1060.)

Stotts & Blume, for defendants in error.

The assignments of error are not sufficiently definite to be considered. (2 Ency. Pl. & Pr., 942, 955, 956; Parish v. St. Paul (Minn.), 87 Am. St., 374; Gude v. Dakota, &c., Co. (S. D.), 58 Am. St., 860; Slotz v. James (Ia.), 59 Am. St., 348; Churchill v. White (Neb.), 76 Am. St., 64; Main v. Main (Ariz.), 60 Pac., 888; Wisler v. Lawler (Ariz.), 62 Pac., 695; Warl v. Sherman (Ariz.), 64 Pac., 434; Barry v. Barry (Kan.), 59 Pac., 685; Dewade v. Miera (N. M.), 61 Pac., 125; Green v. Gibson (Tex.), 18 S. W., 494; Lamance v. Byrnes, 17 Nev., 197; Dennis v. Coughlin (Nev.), 58 Am. St., 761; Lathrop v. Tracy (Colo.), 65 Am. St., 229; Dill v. Marvin (Fla.), 79 Am. St., 171; Miller v. State, 3 Wyo., 657; 29 Pac., 136; Charolean v. Shields et al (Ariz.), 76 Pac., 821; Whitacre v. Nichols (Okla.), 87 Pac., 865.)

The judgment complained of is not identified by the petition in error, and this is necessary. (Merly v. Boulon, 104 Cal., 262; Allport v. Kelly, 2 Mont., 343; Bishop v. Owens (Cal.), 89 Pac., 844; Board v. Shaffner, 10 Wyo., 181.)

The filing of petition in error is jurisdictional, and to permit the amendment requested would be doing indirectly what could not be done directly. No errors not now properly before the court can be considered. (Smyth v. Boswell (Ind.), 20 N. E., 263; Jarvis v. Chase County (Neb.), 97 N. W., 831; Deuch v. Seaside Lodge, 26 Ore., 385; 2 Ency Pl. & Pr., 239-245; Crawford v. Kansas City, 45 Kan., 474; Cogshall v. Sperry, 47 Kan., 448; 28 Pac., 154; Nowland v. Horace, 8 Kan. App., 722; 54 Pac., 919; Brewer v. Moyer (Kan.), 84 Pac., 719; Smetters v. Ramey, 14 O. St., 287; Burke v. Taylor, 45 O. St., 444; Dolph v.

Nickum, 2 Ore., 202; Cook v. Challis (Kan.), 40 Pac., 643; Lavalley v. Skelly, 90 N. Y., 549; Arkansas v. Ry. Co. (Mo.), 80 S. W., 336; Bank v. Wells (Cal.), 90 Pac., 981; Ass'n. v. Wilkins, 71 Cal., 626; 12 Pac., 798; Hastings v. Halleck, 10 Cal., 31; Koutnick v. Koutnick, 196 Ill., 162; Fry v. Bennett, 7 Abb. Pr., 352; 16 How. Pr., 385; Piper v. Van Buren, 27 Hun, 384; Patterson v. McCunn, 38 Hun, 531; Baden v. Bertenshaw, 68 Kan., 32; James v. Higginbotham, 60 Neb., 203; Painter & Co., 7 Ind. App., 642; Cannon v. Cannon, 66 Tex., 682; Evans v. Printing Co., 4 Tex. Civ. App., 327; Blecker v. Shoff, 83 Ia., 265.)

Unless the motion for new trial is assigned as error no errors embraced or that should be embraced in such motion can be considered. (Martin v. Cassert (Okla.), 37 Pac., 586; Beal v. Ins. Co., 7 Okla., 285; Douglas Co. v. Sparks, 7 Okla., 259; Crawford v. Kansas City, 45 Kan., 474; McPherson v. Manning, 43 Kan., 129; Landauer v. Hoagland, 41 Kan., 520; Clark v. Schnur, 40 Kan., 72; Carson v. Frink, 27 Kan., 524; Binn v. Adams, 54 Kan., 615; Coffeyville v. Dolley (Kan.), 84 Pac., 719; Turner v. Franklin (Ariz.), 85 Pac., 1070; Lemon v. Ward, 3 Ariz., 219; James v. Higginbotham, 60 N. W., 203; 82 N. W., 625; Beckwith v. Dierks L. Co. (Neb.), 106 N. W., 442; Doorley v. Buford (Okla.), 49 Pac., 936.)

Where the appeal is taken more than one year after the rendition of the judgment, and the motion for new trial is not assigned as error, the judgment is not reviewable. (Crawford v. Kansas City, 45 Kan., 474; Dyal v. Topeka, 35 Kan., 62; Osbourne v. Young, 28 Kan., 769; Shattuck v. Board, 63 Kan., 849; Mech. Savings Bank v. Harding, 65 Kan., 655; Blockwood v. Shaff (Kan.), 24 Pac., 423; McCrea v. McCrew, 9 Idaho, 382; Smith v. State, 48 Ark., 149; Dowty v. Pepple, 58 O. St., 395; Young v. Schallenberger, 53 O. St., 291.)

The evidence does not sustain the proposition that the receiver was to receive only a nominal compensation. The

objection that the allowance was made upon an *ex parte* hearing is overcome by the fact that the complaining parties were afterwards given a hearing upon their application. The amount to be allowed a receiver is to be determined by the court, and the matter rests in its discretion. (State v. Bank, 61 Neb., 496; Bank v. Badger (Wis.), 79 N. W., 21; Ford v. Ford (Wis.), 59 N. W., 464; *In re* Bank, 57 Minn., 361; Cake v. Mohunn, 164 U. S., 311.) Upon the evidence the amount allowed was no more than was reasonable.

SCOTT, JUSTICE.

This matter arose in the district court of Weston County and involves the validity of an order fixing and allowing Fred Horton certain amounts for compensation as receiver of the Bank of Newcastle. Plaintiffs in error as stockholders of the bank complain that the amounts so allowed were excessive and unwarranted, and bring the case here on error.

1. The defendants in error move to dismiss the proceedings in error on the following grounds:

First—That they were not brought within one year after the rendition of the judgment.

Second—That the petition in error does not give the date of any judgment, and, therefore, fails to specify or identify the judgment complained of.

Third—That if any judgment at all is complained of in the petition in error, it must be a judgment rendered in November, 1905, and the proceedings in error were not instituted within one year from the rendition of that judgment.

The petition in error is as follows: "Comes now the plaintiffs in error, and say, that at the March term of the district court of the Fourth Judicial District in and for Weston County, Wyoming, the defendants in error recovered judgment by consideration of said district court, against the plaintiffs in error, in that certain action pending

therein, entitled as follows: 'In the matter of the receivership of the Bank of Newcastle' and 'Mike Riordan, plaintiff, and W. H. Kilpatrick, R. J. Kilpatrick and Samuel D. Kilpatrick, co-partners under the name and style of Kilpatrick Brothers, interventors, vs. The Bank of Newcastle and Fred Horton, as receiver of the Bank of Newcastle, defendants.'

"That there is manifest error in the record of the proceedings in the trial of said cause.

"That the court erred in overruling the motion of plaintiffs in error in said cause, and in rendering judgment therein in favor of the defendants in error and against the plaintiffs in error, and in its findings of fact and conclusions of law therein. That said findings and judgment are contrary to law and the evidence.

"Plaintiffs in error, therefore, pray that said judgment be reversed and that they be restored to all things they have lost by reason thereof.

"That this court direct the clerk of said district court to forward all original papers and files in said cause and all journal entries made therein, deemed necessary by this court to a full understanding and investigation of said cause and that petitioners have their costs herein."

The plaintiffs in error oppose this motion and ask permission to amend the petition by making it more definite and certain as to the term at which the judgment complained of was rendered and also by inserting after the words, "That the court erred in overruling the motion of plaintiffs in error," the words, "for a new trial." The right to so amend is vigorously contested.

We have no statute specially regulating amendments in proceedings in error. Such amendments by analogy, we think, should conform as near as may be to the provisions of the statute with reference to amendments of pleadings and proceedings in the district courts. Under those provisions no amendment is authorized which will change substantially the cause of action. In such a case it would

amount virtually to an abandonment of one cause of action for a new or different one. So upon error one would not be permitted to substitute a different judgment for the one originally complained of. In the case before us the petition in error refers to the judgment as having been rendered at the March term of the district court of Weston County, whereas the record discloses that no judgment in the cause was rendered at a March term of that court. The record does show that a judgment was rendered in this cause on November 20, 1905, and that a motion to vacate that judgment and grant a new trial was filed in due time and that it was submitted to and decided by the court at the following term on March 5, 1906. No question is made that the record returned in pursuance of the order of this court is other than the record of the case and proceeding here sought to have reviewed, and the cause and the court in which the judgment was rendered having been set out in the petition, and the record disclosing but one judgment in the cause precludes, in our view, the possibility of the parties being misled as to what judgment they were called upon to defend in this proceeding. In *Commissioners v. Shaffner*, 10 Wyo., 181, 189, this court said: "A petition in error should with reasonable certainty describe the cause wherein it is claimed that errors have occurred and the judgment sought to be reviewed ought to be indicated by some certain description. A statement of the cause wherein the judgment was rendered and the date of its rendition should be embraced in the petition. We do not hold that a statement of the date of the judgment is indispensable, if it is otherwise clearly identified and described." We are of the opinion that the judgment of which complaint is here made, though erroneously referred to as having been rendered at the March term, is otherwise sufficiently identified by the petition in error to give this court jurisdiction, and for this reason the proposed amendment is not inhibited and that permission to amend the petition by inserting the true date of the judgment and term of the district court in place of the words "at the March term" should be granted.

The second proposed amendment, viz.: to change the words, "That the court erred in overruling the motion of plaintiffs in error in said cause," so as to read, "That the court erred in overruling the motion of plaintiffs in error for a new trial in said cause," ought not, in our judgment, to be permitted. It is not necessary to assign the overruling of a motion for a new trial as error unless it is desired to have reviewed all matters embraced in such motion without further assignment, though it is usual, customary and the better practice to do so (*Wolcott v. Bachman*, 3 Wyo., 335), and this court will not review errors which are properly grounds for a new trial unless they have been presented by such motion and an adverse ruling made thereon. A party may assign as error one or more grounds embraced in the motion for a new trial and be entitled to have these matters reviewed even though the overruling of the motion for a new trial is not specifically assigned as error.

In this case, aside from the complaint that there has been an adverse ruling upon some motion, the plaintiffs in error complain that the court erred (1) in rendering judgment in said cause in favor of the defendants in error and against the plaintiffs in error; and (2) in its findings of fact and conclusions of law, and (3) that said findings and judgment are contrary to law and the evidence. These alleged errors were incorporated in and were some of the grounds of the motion for a new trial, and the record shows that the motion was ruled upon by the court, and to such ruling exception was duly taken. The time has long since elapsed within which an original petition in error could be filed in this cause. The proposed amendment would not in fact be an amendment to a defective assignment, but would in effect bring into the record matters which are not included within the assignments of error. Such a practice could not be permitted after the time allowed by statute for the commencement of proceedings in error had elapsed.

It is urged that the proceedings were not commenced within one year from the rendition of the judgment, as

provided by Chapter 28, Session Laws 1901. This statute was construed by this court in *Conrad v. Lepper*, 13 Wyo., 473. It was there held that the statute begins to run from the date of the ruling upon the motion for a new trial as to all matters which must or should be embraced in such motion. Applying that rule to the case before us, the record shows that the petition in error was filed within the year after the ruling upon the motion for a new trial.

For the foregoing reasons the motion to dismiss the proceedings in error is denied.

2. It is contended that Horton, being a stockholder of the bank, volunteered his services as receiver free of charge, in order to obtain the consent of the other stockholders to his appointment, and was not, therefore, entitled to ask or receive any compensation for such services.

It may be conceded that in the absence of consent of the parties interested he was not eligible to the appointment, and it may also be conceded that if he obtained their consent by representations on his part and relied upon by them that he would perform the services gratuitously that he would not be entitled to compensation therefor. (12 A. & E. Ency. L. (2d Ed.), 1286; Beach, Trustees, Sec. 748.)

The evidence as to the understanding between him and the stockholders upon this question is conflicting. H. V. Raynor testified that Horton said he was willing to accept the receivership and do it for a nominal compensation for the judge to name after the appointment. V. A. Deatkin says the understanding with Horton was that he was to have a reasonable consideration. Riordan testifies that Horton said that on account of his being a stockholder he was willing to offer his services free of charge. D. A. Fakler, the court commissioner of Weston County, says that Judge Stotts directed him to make the appointment and to include or state in the order of appointment that Horton waived the statutory fee. N. K. Griggs and R. J. Kilpatrick testify that Horton told the latter that if appointed he would act for a very nominal consideration. Isaac Frank

says that Horton told him he would be glad to act as receiver and would be glad to do so for \$150.00 per month. That he, Frank, consented on the part of the stockholders whom he represented and thought most of the stockholders did the same. W. H. Kilpatrick testified that he and his brother consented to the appointment with the understanding that Dr. Horton was to receive only a nominal consideration for his services.

At the time Horton was appointed receiver he signed and filed a statement or so-called waiver of statutory fee, which statement, omitting the caption and signature, is in the words and figures following: "Comes now Fred Horton and files contemporaneous with an order issued by Hon. David A. Fakler, court commissioner within and for the County of Weston, in the State of Wyoming, appointing the said Fred Horton receiver of the Bank of Newcastle, a corporation, a waiver of the statutory fees as such receiver, and consents and hereby agrees to abide by the order and judgment of this court as to the amount of compensation he, the said Fred Horton, shall receive as such receiver and hereby agrees and consents to accept such compensation as the court or judge may fix and determine upon as full compensation for such services, and the statutory fee is hereby forever waived."

Horton testified that he, as well as the others, understood that the statute fixed a fee of ten per cent as compensation to the receiver and it was thought this would be too much; that he never heard of the question of his performing the services for \$150.00 per month as testified to by the witness Frank, and that he did not volunteer his services free of charge, but, on the contrary, he said he would and did waive the supposed statutory fee, as his written statement so made and filed says. That he expected and was entitled to a reasonable compensation for his services to be fixed by the court or judge. In this he was corroborated by the witness Deatkin, who, as above stated, testified that the understanding was that he should have a reasonable compensation.

This evidence being conflicting, the finding of the court thereon against the contention of the plaintiffs in error ought not to be disturbed on this ground. There is no statute fixing the compensation of receivers, and the parties seem to have been laboring under a misapprehension in that respect. We think, however, that the effect of the so-called waiver and the evidence in connection therewith is to limit the amount of compensation of the receiver to what may be reasonable or just and that in no case can it equal or exceed ten per cent commission or, as Horton testified, five per cent for moneys collected and five per cent for moneys paid out. His own testimony is that in the conversation he had with the stockholders of the bank in regard to this matter he represented that this would be excessive for the amount of property involved. Having so represented to the stockholders and obtained their consent to his appointment, he is bound thereby.

3. It is urged that the judgment is contrary to law and the evidence. The record here presented shows that Horton was appointed and qualified as receiver of the Bank of Newcastle on March 17, 1904, in a suit instituted by the state on the relation of the attorney general to dissolve the bank under the provisions of Section 3101, Revised Statutes 1899. On September 5th of that year, upon his petition and application therefor, the court made an order allowing him partial compensation for services as such receiver in the sum of \$1,500. On December 30th following, the court approved a current report of the receiver and upon his petition and application therefor made and entered an order in words and figures as follows, to-wit: "The court having read the report filed December 30, 1904, of the said receiver and being fully informed and advised in the premises, it is ordered, that the same is in all things confirmed, and each and every act of said receiver hereby approved. It is further ordered by the court, that said Fred Horton, receiver aforesaid, be allowed to retain out of any moneys now in or coming into his hands belonging

to the said Bank of Newcastle, the sum of \$7,716 as his full compensation as provided by law for services as said receiver, the court being of the opinion that said sum is equitable and just."

This order was made *ex parte* and the report showed that the creditors of the bank had been paid in full. After the expiration of the term at which these orders were made and on August 7, 1905, Riordan, a stockholder in the bank, having been granted permission to do so, commenced a suit against the bank and its receiver to vacate the orders fixing and allowing compensation to the receiver on the ground that they were wrongful and unlawful, *ex parte*, granted without notice or an opportunity to be heard, without jurisdiction, obtained by fraud and grossly excessive. On September 5th, following, Kilpatrick Bros., who also held stock in the bank, were permitted to file their petition in intervention, in which they attacked the validity of the orders upon the same grounds. On September 8th, 1905, the receiver filed a current report showing his collection and disbursements, and which showed credit in full to himself under the order of September 5, 1904, of \$1,500 and credit to himself of a part of the sum allowed him in and by the order of December 30, 1904. On November 9, 1905, the plaintiffs in error filed their joint motion to strike parts of the report of September 8, 1905, and also joint exceptions to the items complained of. The case and exceptions came on for trial on November 9, 1905, and the court ordered that in so far as the questions were in common to the plaintiffs in error that they should be consolidated and tried together and that the judgment should be binding as to both parties. These questions involved the validity of the orders fixing the compensation of the receiver and the amounts allowed for attorney's fees. The case and exceptions were so tried and the court refused to sustain the exceptions and by its decree recites that: "The court further finds from the evidence that the sum of seven thousand seven hundred and sixteen dollars allowed

by order of this court December 30th, 1904, as compensation for the services of said receiver, was and is the full sum to be received in payment for services of said receiver to and including the final settlement and report of all matters intrusted to him as such receiver." This decree was rendered on November 20, 1905. A motion for a new trial was filed in due time, which was heard and decided on the first day of the next ensuing term of the court, to-wit: March 5, 1906. The petition in error was filed in this court on January 16, 1907.

The duties of the receiver as provided by Section 3101, *supra*, under which the receiver was appointed, was to take charge of the property and assets of the bank and dispose of the same under the direction of the court and from the avails thereof to pay or cause to be paid all costs and expenses of the court, including the receiver's proper charges and expenses in disposing of the property, and distribute the remaining assets as follows: "First, he shall pay the liabilities of the bank in full, if the funds are sufficient for that purpose, and if insufficient, then in *pro rata* proportion. Second, after paying the liabilities of the bank in full, the remaining assets shall be divided among the shareholders *pro rata* according to the number of shares held by each."

The defendants in error are the Bank of Newcastle and Fred Horton, as receiver of the Bank of Newcastle, and the judgment referred to and complained of is one alleged to have been recovered "in the matter of the receivership of the Bank of Newcastle." Enough of the record of the receivership is before us to show that the receivership was and is still pending, that no final report has been made therein, and that there is still property in the hands of the receiver of considerable value, and matters still unsettled by him.

No question is raised in plaintiff in error's brief as to the validity of the allowance for attorney's fees, and that question will be deemed to have been waived or abandoned (Boswell Adm'r., &c., v. Bliler, 9 Wyo., 277; Horn v.

State, 12 Wyo., 80), and for that reason need not here be considered.

The question here raised goes to the validity of the order of December 30, 1904, finally determining the amount of compensation of the receiver. It will be observed that this order as construed by the lower court is an allowance of compensation for services rendered, and to be rendered up to and including the final report. It does not purport nor was it so understood by Horton to be a partial compensation, but it fixes the entire compensation and authorizes the present payment for services, part of which have not yet been rendered; nor does it show how much is for services rendered or how much is for services to be rendered. The power of the court in such matters is to authorize payment from the trust fund for necessary expenses, including the compensation of the receiver. Such compensation may be by partial allowance for services rendered from time to time, on a *per diem* basis, monthly or at stated intervals, a percentage basis, or a lump allowance upon final settlement, depending to some extent no doubt upon the circumstances of the case, but in no case which has come under our observation or been cited to our attention has the total amount of the compensation of the receiver been fixed at the commencement or at any time during the administration of the trust and prior to final report showing the settlement of all matters intrusted to him. Such compensation in part or in whole does not accrue and become a charge against his trust until the services have been rendered, nor could the court fix a reasonable and just compensation for contemplated services of this kind, for evidence of skill, time employed, and the difficulty in marshaling the assets must be taken into consideration in passing upon that question. Further, in case of death or removal of a receiver before the trust was closed and after such an order had been made and he had credited himself with the full amount, or whether he had done so or not, his successor would have to look to the court and would be

entitled to compensation for services rendered by him. The law does not contemplate that the services should be paid for twice or that the insolvent estate should be put to additional expense of litigation in the way of an accounting and recovery of unearned compensation either against the receiver if removed or his representative in case of death.

In *Attorney General v. North Am. Life Ins. Co.*, 89 N. Y., 94, the superintendent of the insurance department upon the rendition of a current report of the receiver and application therefor fixed the compensation of the receiver at five per cent upon the money already in and to come into the hands of the receiver. The court said: "Sufficient reasons have been assigned for directing a reconsideration by the insurance department of its order fixing the compensation of the receiver in this action at five per cent upon the amount of assets of the company which should come into his possession. That order was premature. It was made before the services of the receiver had even approached completion; before commissions were earned or payable; when it was not certain that the officer would complete his duties; when the amount of care and labor required could only be estimated and could not be known, and when any just ground of judgment was hidden in the uncertainties of the future."

In *Maxwell v. Wilmington Dental Mfg. Co.*, 82 Fed., 214, it is said: "The proper time for the final allowance of compensation for a receiver obviously is at the close of the receivership. Unless the receivership be practically at an end, any such allowance is premature. * * * Where a receiver of an insolvent corporation is clothed with the duty of winding up its affairs with all convenient speed, sound policy requires that partial or intermediate allowance of compensation for the receiver should be materially less than the worth of the services rendered by the receiver prior to the making of such allowance; and that the final allowance made at the close of the receivership should be so adjusted that the receiver will have fair and just com-

pensation for his services as a whole, notwithstanding the inadequacy of the partial or intermediate allowances considered by themselves. Such a practice inures to the benefit of creditors and stockholders through its tendency to secure a reasonably prompt settlement of the affairs of the corporation, and a consequent curtailment of the expenses of the receivership. It is also calculated to insure the allowance to the receiver of such, and only such, compensation as shall be fair and just, as well to the creditors and stockholders as to the receiver."

In *People, &c., v. Anglo-American S. & L. Ass'n*, 107 N. Y. (App. Div.), 94 N. Y. Supp., 1113, it is held that there is no objection to the allowance to a receiver of fees which have been earned, and that it might be a great hardship to withhold such fees until a final accounting and that an order granting fees already earned with a reservation of the right to review such order upon final accounting was regular.

In *Meisler v. Meisler*, 94 Ill. App., 396, the parties were husband and wife and the action was by the husband to have a deed from himself to a third party and thence to his wife declared fraudulent and void. The court appointed the wife receiver of the property and by an order authorized her to deduct from the rents and income of the premises the sum of \$50 per month for her services as such receiver, and for the expenses, support and maintenance of herself and her children. The court say: "The defendant in error was appointed receiver by the same order that fixed her allowance, so that at the time she was appointed she had performed no service as receiver. We know of no precedent for such a practice. The usual way of fixing the compensation of a receiver is to refer the cause to ascertain the services performed and report as to the compensation to which the receiver is entitled (3 Daniell's Ch. Pr., Secs. 2277 and 2352), or for the court, on hearing evidence in open court of the services performed, to fix the compensation."

In this connection we refer to one phase of the evidence. Horton says that he talked with stockholders and creditors of the bank and that it was his understanding that when the work was done and the affairs of the bank were completed the court would then be in a position to judge of the services and he would then fix a reasonable fee, and that his understanding was that it would depend largely upon the outcome of the affairs of the bank as to what would be a reasonable fee. We do not think that such an understanding with the creditors and stockholders would preclude the court from allowing partial compensation from time to time for services rendered and less than the value thereof, but we do think, in view of such evidence, that independent of the rule announced in the foregoing decisions, it would be unfair to the stockholders to have his entire compensation fixed until his services had been performed or prior to the approval of his final report.

We are of the opinion that upon the said application of these complaining stockholders the court should have vacated the order of December 30, 1904, as premature, because assuming to fix the compensation of the receiver for services not yet performed, and in refusing to vacate said order error was committed.

For that error the judgment of November 20, 1905, here complained of, will be reversed and vacated, and the cause will be remanded to the district court with directions to vacate the order of December 30, 1904, in so far as it fixes the receiver's compensation, and for such further proceedings in the matter of the receiver's compensation as may be deemed proper.

Reversed and remanded.

POTTER, C. J., and BEARD, J., concur.

KEEFE ET AL. V. DISTRICT COURT OF CARBON
COUNTY.

CRIMINAL LAW—CHANGE OF VENUE—SECOND INFORMATION—JURIS-
DICTION—PROHIBITION.

1. The same offense is charged in two informations for murder against the same defendant, although in the second he is charged jointly with another, where both informations charge the same degree of crime, and the killing of the same person at the same time and place.
2. The statute requiring the prosecuting attorney to elect upon which of two or more indictments against the same defendant for the same criminal act he will proceed (R. S. 1899, Sec. 5300) refers to indictments pending in the same court and one having jurisdiction to proceed on either.
3. The effect of a change of venue in a criminal case, after the filing of the original papers and transcript in the court to which the case has been transferred, is to invest the latter court with complete and exclusive jurisdiction to try the accused upon the information on which the change was granted for the offense therein charged, and, during the pendency of the case in that court, the court granting the change of venue has no jurisdiction to try the accused upon a second information for the same act and offense filed after the change was granted.
4. One of the principal purposes of the writ of prohibition is to prohibit an inferior court from proceeding in a cause over the subject matter of which it has no jurisdiction, and which, if proceeded in, may result in injury or damage for which the party has no adequate or complete remedy in the usual course of law.
5. Where, after a change of venue in a murder case and during its pendency in the court to which it was transferred, the court that granted the change is proceeding without jurisdiction to try the defendant for the same criminal act and offense upon a second information filed after the granting of the change, a writ of prohibition is proper to prevent such proceeding, as the remedy by proceedings in error would be neither complete nor adequate.

[Decided March 21, 1908.]

(94 Pac., 459.)

APPLICATION for writ of prohibition. The proceeding was instituted on behalf of Frank J. Keefe to restrain the

district court of Carbon County from proceeding to try him upon a second information for murder in the first degree, the case upon the first information having been transferred to Albany County on change of venue, and being there pending. The plaintiffs in the proceeding were Frank J. Keefe, and the State of Wyoming on the Relation of said Frank J. Keefe. The defendants were the District Court of Judicial District No. 3, or the Third Judicial District, of the State of Wyoming within and for the County of Carbon, and David H. Craig, Judge of said Court. The material facts are stated in the opinion.

H. V. S. Groesbeck and W. R. Stoll, for plaintiffs.

After a change of venue is properly granted and the cause thereupon transferred, the court granting the change loses all jurisdiction of the case, and the court to which the cause is transferred takes sole and exclusive jurisdiction thereof. (R. S. 1899, Sec. 4289; 12 Cyc., 253; 4 Ency. Pl. & Pr., 470, 471, 486, 487; *People v. Suesser* (Cal.), 75 Pac., 1093; *Frazier v. Fortenberry*, 4 Ark., 162; *State v. Twiggs*, 60 N. C., 142; *Bowles v. State*, 37 Tenn., 360; *State v. Swepson*, 81 N. C., 571; *State v. Rayburn*, 31 Mo. App., 385; *Woodring v. State* (Tex.), 24 S. W., 293; *In re Est. of Whitson* (Mo.), 1 S. W., 125; *State v. Ledford* (N. C.), 45 S. E., 944; *State v. Lay* (Mo.), 29 S. W., 999; *Ammons v. State*, 9 Fla., 530; *Goodhue v. People*, 94 Ill., 37.)

And in a criminal case the court granting the change loses all jurisdiction not only over the indictment or information transferred, but over any other founded on the same transaction and charging the same offense, whether filed at the same or a subsequent time. (R. S. 1899, Sec. 4289; *Johnston v. State* (Ga.), 45 S. E., 381; *Smith v. Com.* (Ky.), 25 S. W., 106; 1 Whart. Am. Cr. L., 521; *State v. Tisdale*, 19 N. C., 159.) The Missouri cases of *State v. Billings*, 140 Mo., 193; *State v. Paterson*, 73 Mo., 695, and *State v. Smith*, 71 Mo., 45, do not controvert this

proposition. They construe a statute peculiar to that state. The proposition contended for does not prevent the prosecution from presenting further indictments for the same offense, but that right cannot be resorted to as a subterfuge, nor can it prevail to compel a trial for the same offense upon more than one indictment, nor to oust a court of its exclusive jurisdiction once attached. (1 Arch. Cr. P. & P., 336-337; 1 Bish. C. L., 1014; 1 Bish. Cr. Proc., 870; 1 Whart. Am. Cr. L., 547; Com. v. Drew, 3 Cush., 279; State v. Tisdale, *supra*; Dutton v. State, 5 Ind., 533; Com. v. Murphy, 11 Cush., 472; Com. v. Berry, 5 Gray, 93; U. S. v. Herbert, 5 Cranch C. C., 87; People v. Van Horne, 8 Barb., 158; Roby v. State (Neb.), 85 N. W., 61; Stuart v. Com., 28 Gratt., 950; Doyal v. State, 70 Ga., 134; Hardin v. State, 4 Tex. App., 355; Cock v. State, 8 Tex. App., 659; State v. Gut, 13 Minn., 315; Richardson v. State, 2 Tex. App., 322; Irwin v. State (Ga.), 45 S. E., 48; State v. Boulter, 5 Wyo., 236; State v. Klugherz (Minn.), 98 N. W., 99.)

Two offenses with which a particular individual is charged are identical when they, in substance, charge one and the same offense committed by one and the same person at one and the same time by one and the same instrument or means and in one and the same transaction. The offense charged in these two informations is clearly the same. The joining of another defendant in the second information does not render the offense charged a different one. (Cock v. State, 8 Tex. App., 659; 12 Cyc., 280, 281; 1 Bish. Cr. L., 1048-1052.)

The application of the defendant for bail under the second information after the plea to jurisdiction was denied did not confer jurisdiction to try him thereon pending the case upon the first information in the other court.

Whenever a plea to the jurisdiction of the court is once made and insisted upon by the defendant, any subsequent appearance to further carry on the case as required under the procedure of the court does not make a general ap-

pearance or waive defendant's right to still question such jurisdiction, and especially is this true where at all times, even after his plea is denied, he continues to object to the jurisdiction. (3 Cyc., 504-509; *Allen v. Miller*, 11 O. St., 374; *Hagood v. Dial*, 43 Tex., 625; *State v. Shipley* (Md.), 57 Atl., 12.)

Keefe cannot now be tried in any court for the offense charged, since he was not brought to trial before the end of the second term of the court having jurisdiction after the filing of the information. (R. S. 1899, Sec. 5382; Const., Art. 1, Sec. 10; 1 Bish. Cr. Proc., 951; 21 Ency. Pl. & Pr., 958; *Robinson v. State*, 12 Mo., 592; *Fanning v. State*, 14 Mo., 386; *In re Spradlend*, 38 Mo., 547; *State v. Cox*, 65 Mo., 29; *State v. Marshall*, 115 Mo., 383; *State v. Steen*, id., 474; *State v. Riddle* (Mo.), 78 S. W., 606; *State v. Ashcraft* (Mo.), 8 S. W., 216; *State v. Wear*, 145 Mo., 163; *Kibbler v. Com.*, 94 Va., 804; *Ex parte McGehan*, 22 O. St., 442; *State v. Garthwaite*, 23 N. J. L., 143; *State ex rel. v. Larson* (N. D.), 97 N. W., 537; *In re McMicken* (Kan.), 18 Pac., 473; *State v. Dewey*, 73 Kan., 735; *People v. Morino* (Cal.), 24 Pac., 892; *In re Begerow*, 133 Cal., 349; *State v. Fasket*, 5 Rich. L. (S. C.), 255; *State v. Kuhn*, 154 Ind., 450; *Guthman v. People*, 203 Ill., 260; *People v. Heider*, 225 Ill., 347; *Dublin v. State*, 126 Ga., 580.) Upon this question the confinement of Keefe in the penitentiary under a conviction for another offense is immaterial. The fact that he was in the penitentiary did not prevent his being brought to trial for another offense. (2 Bl. Com. (Church's Ed.), 686-688; 4 Bl. Com. (Chase's Ed.), 1034-1039; 1 Abb. L. Dict., 105-106; 1 Bish. Cr. L., 953, 966-970; 21 Cyc., 353; *People v. Hong Ah Duck*, 61 Cal., 387; *People v. Majors* (Cal.), 3 Pac., 597; *People v. Flynn* (Utah), 26 Pac., 1114; *Clifford v. Dryden* (Wash.), 72 Pac., 96; *State v. Connell*, 49 Mo., 282; R. S. 1899, Sec. 3699; L. 1905, Ch. 6.)

Prohibition is the proper remedy. (*Dobson v. Westheimer*, 5 Wyo., 34; *State ex rel. v. Dist. Court*, id., 227;

State ex rel. v. Ausherman, 11 Wyo., 410; State ex rel. v. Court, 12 Wyo., 547; State ex rel. v. Court, 13 Wyo., 184.) The mere fact that the questions might be reviewed on a proceeding in error is not sufficient to justify a refusal of the writ, nor the fact that the court below held that it had jurisdiction. (Cases *supra*, and 2 Bailey on Jur., 445-481; Brown on Jur., 175.)

N. R. Greenfield, for defendants.

Where a change of venue is granted upon an information or indictment, the venue is changed only as to that indictment or information, and the court to which the change has been granted has exclusive jurisdiction over it, but that fact in no way precludes the filing of a new information or indictment. Such new or second information or indictment must be filed and presented in the county where the offense is alleged to have been committed, and if the defendant should still desire a change of venue, he must apply anew therefor. (State v. Goddard, 162 Mo., 198; State v. Anderson, 96 Mo., 241; State v. Bartlett (Mo.), 71 S. W., 41; State v. Vinso, 171 Mo., 576; Vaughn v. State, 32 Tex. Cr., 407; Luttrell v. State, 40 Tex. Cr., 651; Hardin v. State, 22 Ind., 347; Dunton v. State, 5 Ind., 533; Winn v. State, 82 Wis., 571.) The court granting a change of venue in a criminal case, therefore, loses jurisdiction only as to the particular indictment upon which the change was granted. To all intents and purposes each separate indictment or information is a separate and distinct case, to which the defendant must plead and take any other steps necessary to his defense. And generally not only may the prosecution file as many indictments or informations as may be deemed advisable, but the pendency of a first is no bar nor a ground for a plea in abatement to a second.

When the jurisdiction of an inferior tribunal depends upon the existence of certain facts, an adjudication by such tribunal of the existence of such facts is conclusive of the question of jurisdiction, and if reviewable at all, must be

reviewed by appeal or error. (Mau v. Ausherman, 11 Wyo., 432; Wells on Jur., 61; 1 Bailey on Jur., 13, 14; Brown on Jur., 18.) The same questions are here raised that were presented by Keefe's plea to the jurisdiction in the district court, and there decided adversely to him. Until that decision is reversed on appeal it must stand as the law of the case, and there would seem to be no ground for prohibition. Keefe, therefore, has a plain, adequate and speedy remedy by proceedings in error. (State v. Court, 5 Wyo., 232; Walcott v. Wells, 21 Nev., 47; High. Ex. Leg. Rem. (3d Ed.), 770, 771.) He failed to avail himself of his remedy after the overruling of his plea to the jurisdiction; but waived whatever rights he had by applying for bail, and demanding a speedy trial. We do not wish to be understood as contending that consent can generally confer jurisdiction of the subject matter, but the matter of venue is a privilege which may be waived, while other rights of the defendant, such as being confronted by witnesses, presence of accused, right to be heard by counsel, etc., are more in the nature of absolute rights, conferred not alone in the interest of the accused, but as essentials to be observed by the state, in order that substantial justice may be rendered. The matter of the time and place of trial are not in the nature of absolute rights of the accused and may be waived by him.

The statute relating to the discharge of a prisoner when not brought to trial within the time provided is not imperative and mandatory. Under a related section the court is given a large discretion in the matter. (R. S. 1899, Sec. 5384; Erwin v. State, 29 O. St., 186; Johnson v. State, 42 O. St., 207; McGuire v. Wallace, 109 Ind., 284.) The failure to bring to trial within the statutory period does not oust the court of jurisdiction, and the defendant may waive his right under the statute. (Leisenberry v. State, 60 Neb., 628; Johnson v. State, *supra*; Cerny v. State (Neb.), 87 N. W., 336; 56 L. R. A., 513, and cases cited.)

There must be imprisonment as well as the filing of an information to put the statute in operation. While Keefe was

in the penitentiary the situation was the same in effect as though he had escaped from the county jail, so far as this question is concerned; and while a defendant is a fugitive from justice the statute does not run. Affirmative action on his part in demanding a trial after his former conviction and during his imprisonment in the penitentiary was necessary to set the statute in motion. (*Meadowcroft v. People*, 163 Ill., 56 (35 L. R. A., 176.)) It has generally been held that the defendant will not be entitled to his discharge where the delay is caused by appeal and error (even by the state where it is finally decided that it had no right of appeal), mistrial, granting a new trial, change of venue, failure to secure a jury, or providential interference, such as illness of the judge or prisoner, or destruction of the court house, continuance to obtain evidence, *nolle prosequi* and filing a new information, or a want of time to try the case. It is also held that the statute does not operate while the defendant is confined in the penitentiary on another offense. (*State v. Brophy*, 8 O. Dec., 698; *Gillespie v. People*, 176 Ill., 238.)

BEARD, JUSTICE.

This is an original proceeding commenced in this court by the plaintiffs praying for a writ of prohibition to be directed to the defendants, the district court of Judicial District Number Three within and for Carbon County, and David H. Craig, judge of said court, commanding it and him to desist and refrain from any further proceedings in a certain criminal action now appearing to be pending in said district court, wherein the State of Wyoming is plaintiff, and the plaintiff herein, Frank J. Keefe, and one William Keefe are defendants. Upon presentation of the petition an alternative writ was issued by this court, and the case has been argued and submitted upon the petition for the writ, the answer of the defendants thereto, and an agreed statement of facts.

The facts, in so far as they are necessary to an understanding of the questions decided, are, that on the 22d day

of May, 1903, the county and prosecuting attorney of said Carbon County filed an information in the district court of said county, charging the said Frank J. Keefe with the crime of murder in the first degree, in that he, the said Frank J. Keefe, did, on the 20th day of April, A. D. 1903, at the County of Carbon and State of Wyoming, unlawfully, wilfully, feloniously, purposely and with premeditated malice kill and murder one Thomas J. King. That upon being arraigned on said information in the district court of Carbon County he did not plead thereto, but upon his application for a change of place of trial a hearing was had resulting in an order of said court, dated August 10, 1903, granting a change of place of trial of said action to the district court of Albany County, where the same is now pending and undetermined and has been so pending and undetermined since about August 13, 1903, when the transcript and original papers on change of venue were filed in that court. That on September 7, 1903, the county and prosecuting attorney of Carbon County filed another information in the district court of that county, charging the said Frank J. Keefe and one William Keefe with the crime of murder in the first degree, in that they, the said Frank J. Keefe and William Keefe did, on the 20th day of April, A. D. 1903, feloniously and purposely, and with premeditated malice, kill and murder one Thomas J. King. That Frank J. Keefe was arrested upon a bench warrant issued March 12, 1907, by the district court of Carbon County, that William Keefe has never been arrested, and that Frank J. Keefe was served with a copy of the last mentioned information March 20, 1907. That on March 26, 1907, he was arraigned in the district court of Carbon County on said last mentioned information and thereupon interposed his plea to the jurisdiction of the court and in bar, setting forth the foregoing facts among others, which pleas were by the court overruled. Whereupon he was again arraigned, but stood mute, and the court ordered a plea of not guilty to be entered for him. That on April

10, 1907, he, still protesting that the court was without jurisdiction, applied for admission to bail. That on April 13, 1907, he was by order of said court admitted to bail and the cause was by order of the court set for trial on October 7, 1907, the first day of the ensuing term of said court. On said last date the cause was reset by order of the court for October 17, 1907, before which last mentioned date the alternative writ in this proceeding was issued and served. The defendants admit in their answer that unless restrained they will proceed to try said Keefe upon said information. It is conceded that the Frank J. Keefe, charged in each of the informations with the murder of King, is the same person, and that the Thomas J. King, alleged in each to have been killed, is one and the same person.

It has not been seriously contended that the offense charged in these two informations is not the same, and we think there is no room for such contention. The party charged in each is the same person, the person alleged in each to have been murdered is identical, the time and place alleged in each are the same and both charge the same degree of crime. The fact that William Keefe is made a defendant in the second information and is jointly charged with Frank J. Keefe could in no way change the character of the offense. The deceased could be killed but once and at one time and place, and, if the killing was criminal, all who participated in it would be guilty and might be prosecuted therefor either jointly or severally. The crime would be single whether the act was that of one or many. The two informations charge the offense in almost identical language, and unquestionably charge the same offense.

It is urged that the county and prosecuting attorney had the right to file as many informations as he chose for the same offense and that such right is recognized by Section 5300, Revised Statutes 1899, which provides, "If there be at any time pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney shall be required to elect upon which he shall proceed,

and upon trial being had thereon the remaining indictment or indictments shall be quashed." If this provision be taken to mean two or more indictments charging the same offense rather than charging different offenses or degrees of offense for the same act, still we think it inapplicable here. It evidently refers to indictments pending in the same court and a court having jurisdiction to proceed on either.

In the present case the court of Carbon County had original and exclusive jurisdiction to proceed against Frank J. Keefe for the killing of King, and it acquired jurisdiction of his person by the filing of the first information by the county attorney and on his being arrested and brought before the court on the charge therein contained. When the change of venue was granted by the court of Carbon County to the district court of Albany County and the original papers and transcript were filed in the latter, the jurisdiction of the district court of Albany County became complete, and the cause then stood for trial at the first regular term thereafter in that court. (Sec. 4289, R. S. 1899.) It then became the duty of the county attorney of Albany County to prosecute the case as though it had originated in that county. (Sec. 1104, R. S. 1899.) "The trial shall be conducted in all respects as if the offender had been indicted or informed against in the county to which the venue has been changed." (Sec. 5336, R. S. 1899.)

Counsel for the defendants here, while conceding that by the change of venue the court of Albany County acquired exclusive jurisdiction and the court of Carbon County lost jurisdiction, argues that the jurisdiction thus acquired by the former and lost by the latter was the right to try the accused upon that particular information and did not deprive the court of Carbon County of jurisdiction to try him upon another information preferred against him in that county for the same offense. In support of this proposition he cites a number of Missouri decisions. Those cases were decided under a statute of that state which provided, "If there be at any time pending against the same

defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment and shall be quashed." It was held in *State v. Eaton*, 75 Mo., 586, overruling *State v. Smith*, 71 Mo., 45, that the finding of the second indictment did not *ipso facto* quash the first. The court said: "The statute suspends the first indictment and declares that it shall be quashed. There could, therefore, be no prosecution under that indictment, because the finding of the second indictment suspended it." And it was held that as no prosecution could be had upon the first indictment which was suspended by the finding of the second, the pendency of the first, although not quashed by any formal order of the court, was not a bar to proceeding on the second. It was also held in *State v. Melvin*, 166 Mo., 565, that under that statute the first indictment, not having been quashed by any formal order of the court, was still in force after the second was quashed on its record. We have no such statute in this state, and the Missouri decisions do not reach the question under consideration. They do, however, recognize the principle that a defendant cannot be subject to trial at the same time upon two informations or indictments charging the same offense.

The effect of the change of venue was to invest the court of Albany County with complete and exclusive jurisdiction to try Keefe upon the first information for the offense therein charged. It is not claimed that the first information is not a good and sufficient information charging Keefe with murder in the first degree for the killing of King, the same offense charged in the second information. When the district court of Carbon County granted the change it lost jurisdiction to try Keefe for the crime there charged against him by the information on which it was then proceeding and could not, either directly or indirectly, vacate its order making the change after the original papers and transcript were filed in the district court of Albany County and the

jurisdiction of that court had become complete. For the purposes of this case it may be conceded that the prosecuting attorney had the right, after the change was granted, to file another information charging Keefe with the same offense and that such information, if filed, must be filed in the county where the offense was alleged to have been committed; but the right to proceed upon such second information is an entirely different question. To permit the court to proceed to trial upon such second information would be to permit it to do indirectly what it could not do directly, viz.: to resume jurisdiction of a case then lawfully pending in another court, which jurisdiction it had lost by virtue of its own order in granting the change.

In *Smith v. Commonwealth*, 95 Ky., 322, Smith had been indicted in Perry County for murder and the venue was changed to Clark County. While this indictment was still pending and undetermined in the Clark circuit court, the grand jury of Perry County again indicted Smith for the murder of the same person. Objection was made to the jurisdiction of the circuit court of Perry County, but that court held that its jurisdiction over the case had not been divested by the transfer of the former indictment to Clark County; and was about to proceed with the trial when Smith applied for and procured a change of venue to Bell County. In the latter court the same questions as to the jurisdiction were presented and were overruled and the case proceeded to trial under protest, resulting in the conviction of Smith, and he appealed. The court said: "It is clear that by its transfer of the case to the Clark circuit court the Perry circuit court lost all jurisdiction over the subject matter of the indictment. The proceedings, therefore, thereafter had on the second indictment were void for want of jurisdiction in the court in which they were had, and this is true of the attempted trial in the Bell circuit court. * * * The so-called trial in Bell was, in legal contemplation, no trial at all, and the same would have been true of every attempted trial in Perry on this second indictment."

In *Johnston v. State*, 118 Ga., 310 (45 S. E. Rep., 381), Johnston was indicted for murder in Dade County and the venue changed to Whitfield County. While this indictment was pending in Whitfield County, Johnston was again indicted in Dade County for the same offense. On being arraigned on this second indictment he interposed in writing objections in the nature of a plea in abatement to being tried in Dade County, and alleging that by the change of venue the court of Dade County was without jurisdiction to try him upon any indictment for the offense charged in the indictment which had been transferred to Whitfield County. After discussing the question and citing authorities the court said: "We are, therefore, satisfied that the superior court of Dade County, upon the change of venue to Whitfield County, lost jurisdiction to try the accused upon the issue joined upon the indictment which was transferred, or upon any other indictment or presentment founded upon the same transaction and charging the same offense." (See also *Bowles v. State* (5 Sneed's Rep.), 37 Tenn., 360; *State v. Swepson*, 81 N. C., 571.)

It seems reasonable that a defendant ought not to be required to defend against two or more charges for the same offense at the same time, especially when there is no question as to where the alleged offense was committed; and our statute recognizes that principle in Section 5300 above quoted. According to the theory of counsel for defendants in this case, the district court of Albany County has complete and exclusive jurisdiction to try Keefe for the murder of King on the first information, and the district court of Carbon County, or the district court of some other county to which the same might be transferred on change of venue, has complete and exclusive jurisdiction to try him for the same offense on the second information; and there is nothing to prevent the two cases from being set for trial on the same day. Neither county attorney could elect upon which he should be tried, for the very obvious reason that he has no control over the case pending

in the other county. We are clearly of the opinion that the district court of Carbon County has no jurisdiction to proceed to try Keefe upon the second information filed in that court during the pendency of the case in Albany County.

It is also contended that a writ of prohibition should not issue in this case because Keefe has an adequate remedy by appeal from the decision of the district court in holding that it has jurisdiction. Without entering upon a discussion of the application of a writ of prohibition, we deem it sufficient to say, that one of the principal purposes of the writ is to prohibit an inferior court from proceeding in a cause over the subject-matter of which it has no jurisdiction, and which if proceeded in may result in injury or damage for which the party has no adequate or complete remedy in the usual course of law. If such remedy exists and is complete and adequate the writ should not issue.

In the case at bar we have held in the former part of this opinion that the district court of Carbon County does not have jurisdiction of the subject-matter of the action in which further proceedings are sought to be prohibited. Has Keefe then an adequate and complete remedy by proceedings in error for the injury or damage he may suffer? We think this question must be answered in the negative. If the case is to proceed in the district court of Carbon County, he must give bail for his appearance or go to jail until he is tried; must be at the expense of defending himself against the most serious charge that could be brought against him, and that in a court having no right to try him; and if convicted, remain in custody until he can have the case regularly heard and determined in this court on proceedings in error. "There must not only be a right to appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ." (*Havemeyer v. Superior Court*, 84 Cal., 327 (18 Am. St. Rep., 192, on p. 238); *People ex rel. L'Abbe v. District Court*, 26 Colo., 386; *State ex rel. Cummings v. Superior Court*, 5 Wash.,

518; Brouillette et al. v. Judge, 45 La. Ann., 243; Weaver v. Toney, 54 S. W. Rep. (Ky.), 732; Crisler v. Morrison, 57 Miss., 791; McInerney v. City of Denver, 17 Colo., 302; Bruner v. Superior Court, 92 Cal., 239.) In each of the cases above cited the right to have the decision of the lower court reviewed on appeal was held to be inadequate, although in none of them was the injury likely to be suffered so great as in the case at bar. In the last case cited the court said: "But it would be a difficult proposition to maintain that a defendant in a criminal case, forced through all the stages of a trial for felony without any indictment against him, or, which is the same thing in effect, upon a void indictment, would have a plain, speedy, and adequate remedy because after conviction and judgment, and perhaps after suffering the ignominy of imprisonment in the state prison, he could have the illegal proceeding reversed on appeal." The case being one where the district Court of Carbon County is without jurisdiction, and where the remedy by proceedings in error is neither complete nor adequate, it is a proper case for the exercise of the powers of this court to grant the writ of prohibition.

Let the writ issue prohibiting the defendants, the district court of Carbon County and Hon. David H. Craig, the judge thereof, from further proceeding against the plaintiff, Frank J. Keefe, in the action now pending in said court wherein the State of Wyoming is plaintiff, and the said Frank J. Keefe and William Keefe are defendants, numbered 518, during the pendency of the case of the State of Wyoming vs. said Frank J. Keefe, now pending in the district court of Albany County.

Writ allowed.

POTTER, C. J., and SCOTT, J., concur.

DUXSTAD v. DUXSTAD.

DIVORCE—ALIMONY AND SUIT MONEY PENDING PROCEEDINGS IN
ERROR—JURISDICTION OF APPELLATE COURT.

1. In a proceeding in error to review a judgment denying a divorce to a wife in her suit therefor, the supreme court, in the exercise of its appellate jurisdiction, may require the husband, defendant in error, to pay a reasonable amount to enable the wife to prosecute her appeal and for the support of herself and child during the pendency thereof.
2. Such relief in an appellate court is not a matter of course, but can be granted only upon a showing of the necessities of the wife, the financial ability of the husband, and that the appeal is taken in good faith.

[Decided March 21, 1908.]

(94 Pac., 463.)

ERROR to District Court, Laramie County, HON. RODERICK N. MATSON, Judge.

Action for divorce brought by Anna Duxstad against Louis Duxstad. Heard on application of plaintiff in error for an allowance to enable her to further prosecute the proceeding in error, and for the support of herself and child during the pendency thereof.

M. A. Kline, for plaintiff in error. (*Sullivan & Squires* upon the brief.)

Within the meaning of the statute (R. S. 1899, Sec. 2995) authorizing an allowance in favor of the wife in a divorce case for expenses and support during the pendency of the action, the action is to be deemed pending until its final determination on appeal or error, or until the time for prosecuting appeal or error shall expire. (*Brasch v. Brasch*, 50 Neb., 73; *McBride v. McBride* (N. Y.), 23 N. E., 1065; *Bohnert v. Bohnert*, 91 Cal., 431; 7 Curr. L., 106; 2 Bish. M. & D., 393.)

The weight of authority is in favor of the right of the appellate court to make the allowance upon an appeal or

proceeding in error. (14 Cyc., 745; *Prine v. Prine*, 36 Fla., 676; *Hall v. Hall*, 77 Miss., 741; *Disborough v. Disborough*, 51 N. J. Eq., 306; *Pleyte v. Pleyte*, 15 Colo., 125; *Goldsmith v. Goldsmith*, 6 Mich., 286; *Pollock v. Pollock*, 7 S. D., 332; *Wagner v. Wagner*, 36 Minn., 239; *Clarkson v. Clarkson*, 20 Mo. App., 94; *Weishaupt v. Weishaupt*, 27 Wis., 625; *Chaffee v. Chaffee*, 14 Mich., 464; *Van Duzer v. Van Duzer*, 70 Ia., 621; *Willits v. Willits* (Neb.), 107 N. W., 379; *Van Vorhis v. Van Vorhis*, 90 Mich., 276; *Pauly v. Pauly*, 69 Wis., 425; *Day v. Day*, 84 Ia., 227; *Lake v. Lake*, 16 Nev., 363; *Lake v. Lake*, 17 Nev., 230; 2 Nelson Div. and Sep., 821.)

The following cases also recognize the right of the wife to suit money pending an appeal, but it seems to have been the practice in those jurisdictions to make the application to the trial court: *Holleman v. Holleman*, 69 Ga., 676; *Bohnert v. Bohnert* (Cal.), 27 Pac., 732; *McNeil v. McNeil*, 19 Pa. Co. Ct., 94; *Larkin v. Larkin* (Cal.), 12 Pac., 226; *Rohrback v. Rohrback*, 75 Md., 317; *Earle v. Earle*, 75 Ill. App., 352; *Haddock v. Haddock*, 75 App. Div., 565.

It is held, however, that such relief in an appellate court is not a matter of course, but can be granted only upon proof made in such court, showing the necessities of the wife and also the financial ability of the husband, and a further showing that the appeal is taken in good faith. (*Prine v. Prine*, *supra*; *Wagner v. Wagner*, *supra*; *Zeigenfuss v. Zeigenfuss*, 21 Mich., 415.)

There can be no dispute in regard to the necessities of plaintiff in error. That is proven beyond any doubt by the affidavits filed herein, and by the testimony adduced on the trial of the cause in the lower court. It having been shown that the defendant in error is able to pay the costs and that the plaintiff in error is unable to do so, and that unless the motion be granted she will be unable to properly present her side of the question, and it having been shown further that this appeal is taken in good faith, and that the majority of the courts of last resort to whom a similar

motion has been presented have held that they have authority to grant a similar motion upon a proper showing, the question arises whether there are any provisions in the constitution of this state different from the provisions in the constitutions of those states in which the appellate courts have exercised such jurisdiction, that will preclude this court from making the order asked for. It will be noticed that the constitution of this state confers a broader authority upon this court in this connection than the constitutions of the other states. The case of *Lake v. Lake*, 17 Nev., 230 (30 Pac., 881), contains a full and conclusive discussion of the question, and upon the reasoning of that case this court clearly has jurisdiction in the premises.

Clark, Riner & Clark, for defendant in error.

Upon this motion the court is asked substantially to sit as a *nisi prius* tribunal. The functions of this court are appellate in character, except in certain specified cases. (Const., Art. V, Secs. 2, 3.) No power is vested to hear evidence and make an order such as here asked for, and the weight of authority is to that effect under similar constitutional provisions. The power to grant alimony and suit money rests alone with the trial court where the suit is brought. (R. S. 1899, Sec. 2995.) The following cases, based upon constitutional provisions as broad as those in this state, deny the jurisdiction of the appellate court to entertain such a motion. (*Reilly v. Reilly*, 60 Cal., 624; *Hunter v. Hunter*, 100 Ill., 477; *Kesler v. Kesler*, 39 Ind., 153; *State ex rel. v. Court*, 88 Mo., 135; *Muir v. Muir* (Ky.), 87 S. W., 1070.)

It is to be observed that the matter of the allowance now sought has not been presented to the trial court. The jurisdiction here asserted is original, therefore, and not appellate. The cases holding that the appellate court has jurisdiction were controlled by constitutional provisions so different that, with two exceptions, they are not in point here. And the reasoning in the cases that may be regarded as in point is illogical.

This court already has complete control of the case for the exercise of its appellate jurisdiction, and an allowance to the wife cannot further assist in the exercise of such jurisdiction. This question seems to have been substantially passed upon adversely to the contention of plaintiff in error in *Nagle v. Robins*, 9 Wyo., 211, 255, where the court declined to allow counsel fees to a guardian incurred in the appellate court in sustaining his account, on the ground that such an allowance required the exercise of original and not appellate jurisdiction. And in that case a fund was under the court's control, which is not the case here.

SCOTT, JUSTICE.

This is an action for divorce and was commenced in the district court of Laramie County by the plaintiff in error as plaintiff against the defendant in error as defendant upon the ground of cruelty. Issue was joined and the case was tried to the court, and at the conclusion of the trial the court made and rendered its judgment of dismissal on the ground that the court had no jurisdiction over the subject matter of the suit. There is one child of tender age as the issue of their marriage, which has been and is in the custody of its mother. During the pendency of the action in the lower court temporary alimony to the amount of \$30 per month for the support of herself and child was allowed to her, but since the dismissal nothing has been paid, on the ground, as we understand, that the dismissal vacated the alimony order. Upon an adverse ruling on her motion for a new trial the plaintiff has brought the case to this court on error and has here filed her motion setting forth that she is without means to support herself and child pending these proceedings, and also without means to further prosecute the case, and asks that this court make a reasonable allowance for such purposes. The motion is supported by affidavits and there are also affidavits to the effect that her appeal is a meritorious one. The motion is resisted on the ground that it calls for the exercise of original and not appellate jurisdiction.

The authorities are not in harmony on this question. It may be conceded that if the granting of the motion involves original jurisdiction, then this court has no power to grant it. Our attention is called to the provisions of our constitution. Section 2, Article V, is as follows: "The supreme court shall have general appellate jurisdiction co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be provided by law." Section 3 of the same article provides: "The supreme court shall have original jurisdiction in *quo warranto* and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, *certiorari*, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any district court of the state or any judge thereof."

It is urged that these provisions of the constitution inhibit this court from entertaining jurisdiction of the matter here involved and in support of such contention the following cases are presented, viz.: *Reilly v. Reilly*, 60 Cal., 624; *Hunter v. Hunter*, 100 Ill., 477; *Kesler v. Kesler*, 39 Ind., 153; *State ex rel. Clarkson v. The St. Louis Court of Appeals*, 88 Mo., 135; *Muir v. Muir*, 87 S. W. (Ky.), 1070.) It was sought upon argument to show that there is some distinction between the provisions of the constitutions of these states and those where a different judicial interpretation obtains, but we find upon examination that there is practically no difference. It is said in 14 Cyc., at page 745: "The authorities differ as to the power of an appellate court to grant an order directing the payment of temporary alimony and suit money upon an appeal in a divorce action. In

some jurisdictions such power is denied, but the weight of authority is in favor of the exercise of the power."

In those jurisdictions where the power is exercised it is not put upon the ground nor is it claimed to be the exercise of original jurisdiction. The right to grant such allowance in the court below exists independent of statute. The statute is only confirmatory of the common law. Upon an original application to the appellate court for counsel fees it was said in *Lake v. Lake*, 16 Nev., 363, 369: "No statutory provision authorizes an allowance for counsel fees in this court. But such right has been exercised by courts of similar jurisdiction in conformity with the decisions of the ecclesiastical courts of England. (*Goldsmith v. Goldsmith*, 6 Mich., 285, and *Phillips v. Phillips*, 27 Wis., 252.) The exercise of such authority is based upon the presumption that jurisdiction in divorce cases carries with it by implication the incidental power to make such allowances. The power is indispensable to the proper exercise of jurisdiction in guarding the rights of wives."

The question is more fully discussed in *Lake v. Lake*, 17 Nev., 230, 237, where it is held that a grant of appellate jurisdiction necessarily implies the grant of all powers necessary to the complete exercise of such jurisdiction. The question was discussed in *Prine v. Prine*, 36 Fla., 676 (34 L. R. A., 87), and it was there held that an original application to an appellate court in which the suit was pending for allowance of temporary alimony, counsel fees and suit money to the wife pending the proceedings does not call for the exercise of original jurisdiction, but may be granted in aid of and as an incident to its appellate jurisdiction. In *Pleyte v. Pleyte*, 15 Colo., 125 (25 Pac., 25), the court say: "Defendant's counsel deny the jurisdiction of this court to grant such relief. The practice of appellate courts in respect to applications of this kind is by no means uniform. By Section 1098, Gen. St., the jurisdiction to grant alimony *pendente lite* is expressly conferred upon the district courts, but counsel fees and suit money are not

specified; nevertheless such allowances have been sustained by this court. Hence, the jurisdiction does not depend upon statute." The court in that case granted the motion, basing its right to do so on the ground that it was in aid of its appellate jurisdiction.

In *Wagner v. Wagner*, 36 Minn., 239, 243, the court say: "The appellant makes a motion in this court for an allowance to enable her to prosecute this appeal. We have no doubt of the power of the court, upon a proper showing, in a suit for divorce, to make an order requiring the husband to pay to the wife such sum as may be necessary to prosecute or defend an appeal in this court; but as this appeal is now decided, and the case goes back to the district court, which has ample power in the premises, we decline to consider appellant's application."

In many cases the power to make the order has not been discussed. Such power has been assumed as a matter of course without objection thereto and the relief has been granted upon a proper showing. In the following cases, in addition to those already referred to, appellate courts have acted upon similar motions granting them on a sufficient or denying them upon an insufficient showing: *Van Duzer v. Van Duzer*, 70 Ia., 614; *Day v. Day*, 84 Ia., 221; *Krause v. Krause*, 33 Wis., 354; *Phillips v. Phillips*, *supra*; *Varney v. Varney*, 54 Wis., 422; *Friend v. Friend*, 65 Wis., 412; *Pauly v. Pauly*, 69 Wis., 419, 425; *Chaffee v. Chaffee*, 14 Mich., 276; *Zeigenfuss v. Zeigenfuss*, 21 Mich., 414; *Van Voorhis v. Van Voorhis*, 90 Mich., 276; *Disborough v. Disborough*, 51 N. J. Eq., 306; *Grant v. Grant*, 5 S. Dak., 1; 57 N. W., 1130; *Pollock v. Pollock*, 7 S. Dak., 331; *Mercer v. Mercer*, 19 Colo. App., 51 (73 Pac., 662); *Hart v. Hart* (Colo. App.), 73 Pac., 35; *Hall v. Hall*, 77 Miss., 741 (27 So., 637); *Willits v. Willits* (Neb.), 107 N. W., 5 L. R. A. (N. S.), 767. It will be observed that such relief in an appellate court is not a matter of course, but can be granted only upon a showing of the necessities of the wife, the financial ability of the husband and that the

appeal is taken in good faith. When allowed by appellate courts, it is upon the theory that the allowance is necessary and proper to enable the wife to maintain her rights on the appeal, since being without means, she could not otherwise do so, and thus that such an allowance is in aid of the exercise of the appellate jurisdiction.

We are of the opinion that by the great weight of authority this court in the exercise of its appellate jurisdiction may consider the motion, and make such order in the premises as may be deemed advisable. The defendant has not been heard upon the merits of the application and before making any order we think he should be given a reasonable time to file such affidavits touching the matter as he may deem advisable, and an order fixing the time within which he may do so will be entered.

POTTER, C. J., and BEARD, J., concur.

CITY OF RAWLINS v. JUNGQUIST.

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—DAMAGES—
SINGLE CAUSE OF ACTION—PRESENTATION OF BILL—ALLOWANCE OF
PART AND ACCEPTANCE—ACCORD AND SATISFACTION—PLEADING—
EVIDENCE—APPEAL AND ERROR—ORDER UPON REVERSAL.

1. Where certain abutting property is damaged by a change in the grade of a street the owner's cause of action against the city is single and not separable, and hence the presentation by the owner of an itemized bill of such damages is to be construed as a presentation of the claimant's entire demand.
2. A city having allowed and the owner having accepted a less sum than the amount claimed upon a bill representing an unliquidated claim for damages to abutting property caused by a change in the grade of a street, the presumption is that it was intended as full compensation, and in a suit for the balance the burden is upon the claimant to show a different understanding, where the previous allowance and

acceptance are shown under the city's plea of accord and satisfaction.

3. An itemized bill of damages to abutting property of the claimant caused by a change in the grade of a street having been presented to a city, and the record of the meeting of the city board at which the bill was acted on showing only that the claim for damages account grading for a stated sum, being the total amount of the bill, was presented and that a less amount was allowed, the action of the board, in the absence of a contrary showing, is to be construed as a rejection of the part not allowed, and as an allowance of a part in full settlement of the claim.
4. The several items of the bill being elements or integral parts of the damage resulting from a single cause, the fact that the amount allowed equals the aggregate of certain items, opposite which appears unexplained pencil marks, is not in itself sufficient to show that the allowance was intended as a partial and not a full payment of the claim.

ON PETITION FOR REHEARING.

5. Where the sufficiency of a pleading is questioned for the first time by an objection to the introduction of evidence, the most liberal construction will then be adopted to sustain it, if possible, and such objection will not be sustained unless there is an entire omission of a material fact or a total failure to state a cause of action or defense.
6. As against an objection upon the trial of a cause to the introduction of evidence a pleading will not be held insufficient merely because it states a material fact in the form of a legal conclusion.
7. As against an objection to the introduction of evidence, the defense of accord and satisfaction is held to have been sufficiently pleaded in an answer which alleged the allowance and payment by defendant of a part of plaintiff's claim as full compensation and that plaintiff accepted the same and thereby compromised and settled any and all claim which he might or did have against the defendant for the damages sued for, notwithstanding that the averment that plaintiff settled the claim by accepting the payment was stated in the form of a legal conclusion.
8. Where the finding of the trial court upon a material fact is found not sustained by sufficient evidence, and the finding upon another material fact is indefinite, and the judgment is reversed on error on that ground, as well as for error in

overruling the motion of the complaining party for a new trial, the proper order is one remanding the cause for a new trial.

[Decided March 21, 1908.]

(94 Pac., 464.)

[Rehearing denied June 23, 1908.]

(96 Pac., 144.)

ERROR to the District Court, Carbon County, HON. DAVID H. CRAIG, Judge.

The material facts are stated in the opinion.

Charles E. Blydenburgh, for plaintiff in error.

A city is not liable for damages to abutting property by change in the grade of streets in the absence of some statute or constitutional provision imposing such liability. (2 Dill. Mun. Corp. (4th Ed.), 1214.) Where a constitutional provision is adopted such as Section 33 of Article I of the Wyoming Constitution, providing that private property shall not be taken or *damaged* for public or private use without compensation, a liability is usually held to be imposed. But the municipality has the power to grade and improve streets, which is not exhausted by its first exercise. And it is held that the city is not liable for the first change of grade, or bringing the streets to the first grade established, though there are contrary decisions. (Dill. Mun. Corp., 1236-1237; O'Donnell v. White, 24 R. I., 483.) Also that where a liability exists, a property owner cannot recover where he consents to or does the grading himself, or where he had made improvements after the grade was established, although the surface on actual change did not conform to the established grade. (Jeffersonville v. Myers, 28 N. E., 999; Burlington v. Gilbert, 51 La., 356; Denver v. Vernia, 8 Colo., 399; Davis v. Ry. Co., 24 S. W., 777; Klinkenbeard v. St. Joseph, 27 S. W., 521; Wilber v. Fort Dodge, 90 N. W., 186; Groff v. Philadelphia, 24 Atl., 1048; Maghee v. Avondale, 31 Wkly. L. Bul., 163; Neubert v. Toledo, 2 O. Dec., 148; Owens v. Milwaukee, 47 Wis., 461.) And that in no event is the city liable for the work

done in grading sidewalks or for destruction of sidewalks or for laying sidewalks. (*Shelton v. Birmingham*, 24 Atl., 978; *Lewis v. New Britain*, 52 Conn., 568.) That conformation of inequalities of surface to grade is not a change of grade. (*Comiskey v. Suffern*, 22 N. E., 420; *Omaha v. Williams*, 71 N. W., 970.)

The acceptance by the plaintiff of the amount allowed by the city upon his presented bill for the damages claimed and here sued for amounted to a compromise of the entire demand, and a further recovery is not permissible. (*Lathrop v. Evans*, 45 Pac., 236; *Sewell v. Mead*, 52 N. W., 227; *Board v. Seawell*, 41 Pac., 592; *Wapello Co. v. Sinnamon*, 1 G. Greene, 413; *Fulton v. Monona Co.*, 47 Ia., 622; *Brick v. Plymouth Co.*, 63 Ia., 463; *Bradley v. Delaware Co.*, 57 Ia., 552; *U. S. v. Adams*, 7 Wall., 463; *U. S. v. Child*, 12 Wall., 232; *Davey v. Big Rapids*, 48 N. W., 178; *Browne v. Board (Mich.)*, 85 N. W., 745; *Sharp v. Mauston*, 66 N. W., 803; *People v. Board*, 52 N. Y., 89; *Perry v. Cheboygan*, 21 N. W., 333; *Board v. Morgan*, 65 Pac., 41; *Murphy v. U. S.*, 14 Otto, 464 (5 N. W., 176); 17 Am. Dec., 118; *Alice v. Billing*, 2 Cush., 26; *Fisher v. Hay*, 5 Am. Dec., 626; 8 Cyc., 533; *Harding v. County*, 7 N. W., 466; *Hodge v. Hodge*, 26 Am. Dec., 52; *Vosburgh v. Teator*, 38 N. Y., 561; *Powell v. Jones*, 44 Barb., 521; *Hunter v. Com'rs.*, 62 Atl., 213; *Morse v. Monroe*, 30 Ga., 630; *Frick v. Price*, 66 N. W., 834; *Oglesby v. Attrill*, 105 U. S., 605; *Comstock v. U. S.*, 9 Ct. Cl., 141; *Taylor v. Patrick*, 4 Ky., 168; *Adele v. Prudhomme*, 16 La. Ann., 343; *Tard v. Tarry*, 26 Mo. App., 598.) The evidence does not show certain items only were allowed. The allowance was on account of the entire claim.

Interest on the damages found was improperly allowed for two reasons. First, there was no prayer for interest, and, therefore, none is allowable. (*R. S.* 1899, Sec. 3533. Sub. 3; *March v. Wright*, 14 Ill., 248; *Carter v. Lewis*, 29 Ill., 500; *Prescott v. Maxwell*, 48 Ill., 82; *Race v. Sul-*

livan, 1 Ill. App., 94; Grand Lodge v. Bagley, 60 Ill. App., 589; David v. Conrad, 1 G. Greene, 336; Krause v. Hampton, 11 Ia., 457; Green v. Dunn, 5 Kan., 254; Shepard v. Pratt, 16 Kan., 209; Graves v. Adm'r., 4 Ky. L. R., 452; Babin v. Nolan, 6 La. Ann., 295; Brown v. Bessou, 30 La. Ann., 734; Van Piper v. Morton, 1 Mo. App., 651; 61 Mo. App., 440; Goggan v. Evans, 12 Tex. Civ. App., 256; Adams Exp. Co. v. Milton, 74 Ky. (11 Bush.), 49; Shockley v. Fischer, 21 Mo. App., 551; Denise v. Swett, 68 Hun, 188.) Second, interest is not generally recoverable upon unliquidated demands. (22 Cyc., 512, and note.) There is an exception to this rule, viz.: that where an unliquidated demand is capable of and is ascertainable by mere computation it will bear interest, but where it requires evidence and a trial to ascertain the amount, then interest is not allowed, especially if the evidence is conflicting. The matter of interest is purely statutory. By no construction of the statutes on the subject can they be made applicable to a claim for damages caused by a change of grade. (Hawley v. Baker, 5 Colo., 118; Palmer v. Murray, 21 Pac., 127.)

L. E. Armstrong, for defendant in error.

The liability of a municipal corporation for damages caused to abutting property through a change in the grade of streets is clear under our constitution. (Art. 1, Sec. 33; Pumpelly v. Canal Co., 13 Wall., 166; 2 Abb. Mun. Corp., 1837; R. R. Co. v. Ayres, 106 Ill., 511; Chicago v. Taylor, 125 U. S., 161; Mayor, &c., v. Herman, 16 So., 434; St. Louis v. Lang, 33 S. W., 54; Ogden v. Phila., 22 Atl., 694; O'Brien v. Phila., 24 Atl., 1047.) There seems to be no reason for distinguishing between damages occasioned under an ordinance changing the grade, and those caused under an ordinance which for the first time fixes the grade. (Bloomington v. Pollock, 31 N. E., 146.)

The evidence does not sustain the proposition that the allowance and acceptance of a part of plaintiff's claim was a compromise. There was no mutuality of agreement or under-

standing necessary to a compromise. (*Oil Co. v. Wilson*, 56 S. W., 429; *Jennison v. Stone*, 33 Mich., 99; *Barnawell v. Threadgill*, 56 N. C., 50; *Norris v. Slaughter*, 3 Greene, 116; *Luce v. Ins. Co.*, 15 Fed. Cas. No. 8589; *Lampkins v. R. Co.*, 8 So., 530; *Carver v. Louthain*, 38 Ind., 530.)

The general rule is that it is sufficient if the party to whom an offer of compromise is made clearly gives evidence of his intention to accept an offer as a settlement of the disputed claim; such intention may be shown either by word or letter, or it may be constructive or implied from the acts of the party to whom the offer was made, as where he receives and retains the amount which to his knowledge was offered on condition of its being accepted as a compromise; but, in the case at bar, the attention of the defendant in error was never called to the fact that the money which was paid to him was in any sense a compromise. It was not accepted for damage done by lowering the grade, but in payment for the destruction of the sidewalks and for the relaying of the same, shown by the fact that the amount allowed is the amount of the items of the bill relating to the sidewalks. (*Fuller v. Kemp*, 33 N. E., 1034.)

A compromise must be established by a preponderance of the evidence. (*Bank v. Galvin*, 45 N. E., 353; *Grove v. Bush*, 53 N. W., 88.) An examination of the bill in question will clearly show that the subject of damage for change of grade was never entered into, nor included in the allowance made by the board. Jungquist received the warrant knowing that the board had considered and acted upon but three items of his bill, none of which pertained to the damage to his property by virtue of the grading, but only for the payment for the destruction of the material in his sidewalks, and for the expense of relaying the same. There was not, therefore, any allowance and acceptance of payment of a part in settlement or satisfaction of the entire claim. (*Ins. Co. v. Siebert*, 56 N. E., 686; *Lambkin v. R.*

R. Co., 8 So., 530.) A transaction to amount to a compromise must be agreed on and consented to. It must be shown that there was a full and complete settlement of all matters and things in controversy. (*Forbes v. Petty*, 37 Neb., 899.)

The allegation of the answer on the subject of settlement is a mere legal conclusion, and does not constitute a defense. Testimony in support of it was admitted erroneously over plaintiff's objection. And the reply did not aid the defective answer. (*West v. Cameron* (Kan.), 18 Pac., 894; *Ry. Co. v. Shepherd* (Neb.), 85 N. W., 189; *March v. Marshall*, 53 Pac., 396; *Renihan v. Wright*, 9 L. R. A.; *Marshall v. Mathers* (Ia.), 3 N. W., 120.) It is not too late to question the sufficiency of the answer, since the evidence offered under it was timely objected to. (*Bank v. Smith*, 11 Wheat., 171; *Hurd v. Brew. Co.* (Tex.), 51 S. W., 883; 57 S. W., 573; *Abbott's Tr. Br. on Pl.*, 1281, 1279, and cases cited.)

The allowance of interest is complained of, and it is true the petition does not contain a prayer for interest. There is a difference between interest as damages and contractual interest; the proper distinction being that where interest is payable by virtue of a contract it is an integral part of the debt. (*Davis v. Harrington*, 35 N. E., 771; *Ohio v. R. Co.*, 6 O. St., 489.) But where interest is recoverable as damages, it is merely an incident of the principal debt, and follows the principal as such incident, until it is separated and set apart in some manner as a particular debt. (*Washington v. Bank*, 28 Am. Dec., 333; *S. R. Co. v. Moravia*, 61 Barb., 180.) Where interest is recoverable as damages and is a legal incident of the debt sued on, or where the allowance is required under equitable principles, interest should be allowed, although no demand is made therefor in the bill or declaration. (*Lane v. Cluckauf*, 27 Am. Dec., 121; *Stanley v. Anderson*, 65 N. W., 247; *Peterson v. Mannix*, 90 N. W., 210; *Whitaker v. Pope*, 29 F. C. No. 17528; 2 Abb. Tr Br. Pl., 1743; *R. Co. v. Great-*

house, 17 S. W., 834; Porter v. Russeck, 29 S. W., 72; 44 S. W., 550.)

The measure of damages is the difference in the market value of the property immediately before and immediately after the grading. (O'Brien v. Phila., 24 Atl., 1047; Council v. Schameck, 23 S. E., 400; Stewart v. Council Bluffs, 50 N. W., 219; Topeka v. Martineau, 5. L. R. A., 775; Council v. Maddox, 7 So., 453; Lowe v. Omaha, 50 N. W., 760; Bachus v. Ry. Co., 37 Pac., 750.) While such items as the cost of lowering to grade cannot be shown as substantive items of damages, it is proper to be taken into account by the witnesses in forming their opinion of the depreciation in the value of the property. (Esclick v. Ry. Co., 3 N. W., 700; Chase v. Portland (Me.), 29 Atl., 1104; Topeka v. Martineau, 22 Pac., 419; McCarty v. St. Paul, 22 Minn., 52; Stowell v. Milwaukee, 31 Wis., 523; Cook v. Ansonia (Conn.), 34 Atl., 183; Council v. Schameck, 23 S. E., 400; Lowe v. Omaha, 59 N. W., 760; Dawson v. Pittsburgh, 28 Atl., 171; Stewart v. Council Bluffs, 50 N. W., 219; Sedg. Dam. (8th Ed.), 1163, *et seq.*; Lewis Em. Dom., 478, 484, and cases cited; Omaha v. Hansen, 54 N. W., 83.)

The term "land," as used in constitutional provisions as to eminent domain has often received an interpretation to the exclusion of improvements; but the word "property" is much broader than land and includes improvements. (Dallzell v. Davenport, 12 Ia., 437; Preston v. Cedar Rapids, 64 N. W., 377; Lafayette v. Nogle, 113 Ind., 426; Seasongood v. Cincinnati (O.), 5 Cir. Ct., 225; *In re Wall Street*, 17 Barb., 617; Refenthaler v. Phila., 28 Atl., 840.)

L. E. Armstrong and *Chris Mathison*, for defendant in error. (On petition for rehearing.)

Though it will be presumed that a general settlement included all matters of difference between the parties, there is no presumption of a general settlement; whether or not there has been a general settlement is a matter of proof

with the burden upon the party alleging it. The proof in the case at bar failed utterly to show such a settlement, and the plaintiff's acceptance of the amount allowed was not with knowledge or notice that the remainder of the claim had been rejected, and hence the case does not come within the rule of accord and satisfaction upon payment and acceptance of a part in full settlement. (11 Cyc., 599, and cases cited.)

It is the unquestionable rule that parties may settle not only substantive items of a single cause of action, but elements of general damage. (Mulligan v. Ice Co., 109 N. Y., 657; Hinkle v. Ry. Co. (Minn.), 18 N. W., 275; Green v. County (Neb.), 85 N. W., 438; Board v. Mach. Works (Ind.), 42 N. E., 689; Watson's Dam. for Per. Inj., 700, 701.)

Whether there has been a settlement in full is a question of fact. (Hinkle v. Ry. Co., *supra*; Anderson v. Granite Co. (Me.), 43 Atl., 21; Spokane v. Costello (Wash.), 84 Pac., 652; Green v. County, *supra*; Coal Co. v. Parlin (Ill.), 74 N. E., 143; Johnson v. Bards (Ia.), 106 N. W., 609.)

There being no presumption of law that a general settlement occurred, the fact would not be established in this case without showing that the plaintiff knew that the balance of his claim had been rejected, and there is no evidence in the case of any such knowledge on his part. To constitute an accord and satisfaction it is necessary that the payment be offered in satisfaction under such circumstances that the party to whom it is tendered takes it subject to such condition. (Beaver v. Porter (Ia.), 105 N. W., 346.) That the burden of proof was on the defendant seems to be clear. (Bray v. Bray (Ia.), 103 N. W., 477; Franks v. Matson (Ill.), 71 N. E., 1011.)

While the city attempted to plead and prove a general settlement, yet no contract (complete in itself) importing to settle all differences (Freeman v. Freeman (Mich.), 35 N. W., 897) has been shown; nor has it been shown that all

the liability was in contemplation of the parties at the time or that there was a purpose in making such payment to settle all of their mutual differences. (*Spokane v. Costello*, 84 Pac., 652.) Though the defendant pleaded a general settlement, he must prove it; and it is competent for the plaintiff to show the contrary, and even that certain items were not included in a settlement. (*Dudley v. Iron Co.*, 13 O. St.; *Ins. Co. v. Siebert* (Ind.), 56 N. E., 686.)

The retention of the amount paid proves nothing, unless it was paid and accepted in full settlement. (7 Cur. L., 13, 16; *Caine v. Life Asso'n.*, 115 Ill. App., 307; *Creighton v. Gregory* (Cal.), 75 Pac., 569; *Greenlee v. Mosnat* (Ia.), 90 N. W., 383; *Neely v. Thompson* (Kan.), 75 Pac., 117.)

The defense of accord and satisfaction must be specially pleaded. The plea in this case was a mere legal conclusion, and, therefore, insufficient, and the objection to evidence under the plea sufficiently raised the question. (*Renihan v. Wright* (Ind.), 25 N. E., 822; *Sheets v. Russell* (Ind.), 40 N. E., 30; *Eachus v. Ry.* (Cal.), 37 Pac., 750.) If the proof had gone in without objection the failure to specially plead the defense would not be waived in the absence of a verdict or finding sustaining it. (*Wilkerson v. Bruce*, 37 Mo. App., 156; *Dailey v. Asso'n.* (Mich.), 95 N. W., 326.) The plea of payment amounted only to a set-off. (*Hedlun v. Min. Co.* (S. D.), 92 N. W., 301; 1 Cyc., 341, 342.) That the allegations were insufficient to constitute a defense of accord and satisfaction, see *Heath v. Doyle*, 18 R. I., 252; *Karter v. Fields*, 140 Ala., 352; *Towry v. U. S.*, 42 Fed., 207; *Johnson v. Hunt*, 81 Ky., 321; *Canal Co. v. Van Vorst*, 21 N. J. L., 100; *Bird v. Carital*, 2 Johns., 342; *Hogan v. Burns* (Cal.), 33 Pac., 631.) Evidence of accord and satisfaction is not admissible under plea of payment. (*Wallace v. Chandler*, 16 Ark., 651; *Johnson v. Neimeyer*, 10 Ind., 350; *Hamilton v. Coons*, 35 Ky., 317; *Adm'rs. v. County* (Ky.), 90 S. W., 1054; *Rutan v. Huck* (Utah), 83 Pac., 833.)

The council, in the case at bar, treated the items allowed as distinct damages and failed to act on the part of the

claim for depreciation in the value of the property. The latter was left open.

Should reversal be adhered to, the cause should be remanded for new trial.

Charles E. Blydenburgk, for plaintiff in error, submitted the following points and authorities upon the question whether upon reversal the cause should be remanded for new trial or with direction to enter judgment for plaintiff in error, the defendant below, and contended that judgment should be directed:

It would be incompetent to alter the effect of the record of the action of the city board in relation to the claim of defendant in error by parol testimony. (*Aurora v. Fox*, 78 Ind., 1; *Childrey v. City*, 11 L. R. A., 315; *Yavapai Co. v. O'Neil*, 29 Pac., 430; *Cory v. Hamilton*, 51 N. W., 54; *Whitehead v. Sch. Dist.*, 22 Atl., 991; *Lowell v. Wheelock*, 11 Cush., 391; *Morrison v. Lawrence*, 98 Mass., 219; *In re Buffalo*, 78 N. Y., 362; *Johnson v. Co.*, 12 Neb., 28; *Company v. Tierney*, 47 Ill. App., 840; *Taylor v. Henry*, 2 Pick., 397; *Methodist v. Herrick*, 25 Me., 354; *Gilbert v. City*, 40 Conn., 102; *Baker v. Scofield*, 58 Ga., 182; *Clark v. Robinson*, 88 Ill., 498; *Hall v. Jackson Co.*, 95 Ill., 352; *Moor v. Newfield*, 4 Me., 44; *Small v. Pennell*, 31 Me., 267; *Medlin v. Platte Co.*, 8 Mo., 235; *Maupin v. Franklin Co.*, 67 Mo., 327; *Greely v. Quinby*, 22 N. H., 335; *Meeker v. Van Rensselaer*, 15 Wend., 397; *Thompson v. Smith*, 2 Denio, 177; *Cabot v. Britt*, 36 Vt., 349; *Eastlind v. Fogo*, 58 Wis., 274.) It cannot be said, therefore, that a new trial will bring out any further facts upon the point in issue.

It is a fundamental proposition that where a litigant has had an opportunity to present evidence of which he should have knowledge, and has failed to do so, a new trial will not be allowed for the purpose of allowing him to introduce such evidence or to produce cumulative or other evidence. Section 4265, Revised Statutes 1899, is mandatory and applies here requiring either the rendition of a proper judgment by

the appellate court or that the lower court be directed to render the same. (R. R. Co. v. Simpson, 5 O. St., 251; Bunn v. Kinney, 15 O. St., 40; Higgins v. Higgins, 57 O. St., 239; Ins. Co. v. Church, 21 O. St., 492.)

Under the record in this case all of the findings of fact might stand and yet the judgment would have to be reversed on account of error in the conclusions of law and in applying the law to the facts found. The record is before the court and from that record the judgment the district court should have rendered is evident, viz.: dismissal or for the defendant, and this is the judgment that has been rendered by the supreme court, and we can see no reason why it should be modified in any way, or that the case should be remanded for a new trial. The ends of justice could not in any way be subserved thereby.

SCOTT, JUSTICE.

This action was commenced in the district court of Carbon County by William Jungquist, the defendant in error, as plaintiff, against the City of Rawlins, plaintiff in error, as defendant, to recover for alleged damages to his property by reason of lowering the grade of streets adjacent thereto in accordance with an ordinance of the city.

From the record it appears that for many years Jungquist has been and is the owner of a lot of 24 feet frontage on Fifth street and extending back along Cedar street with the same width in the rear and to a depth of 132 feet. The lot was occupied by a large frame store building and basement and a small frame store building, the first being used in the hardware business which was conducted in and upon said premises by the plaintiff until some time in the month of January, 1902. That in 1901 and 1902 the grades and surfaces of the adjoining streets were altered and changed by an ordinance and made to conform thereto. Thereafter and on September 24, 1902, Jungquist presented to and filed a bill with the board of trustees of the City of Rawlins, in which he claimed damages in the sum of \$1,629.65 to his

property by reason of the change in the grade. Thereafter and on December 31, 1902, the board took up and considered the bill and allowed the sum of \$277.65, which was paid to and accepted by Jungquist. On August 26, 1903, he presented to the trustees another verified bill for \$3,400 for damages to the same property, \$2,500 of which was for diminution in the value of his premises, and also \$900 for damages by reason of loss of rents alleged to have been caused by the premises being rendered inaccessible by the city's regrading Fifth and Cedar streets of that city. This bill does not appear to have been acted upon by the trustees.

The defendant pleaded as one of its defenses that the payment to and acceptance by Jungquist of the sum of \$277.65 allowed on his bill which he presented and wherein he claimed \$1,629.65 as damages operated as a full compensation and a complete settlement of all matters, differences and damage by reason of any action of the City of Rawlins in grading the streets adjacent to his property.

The case was tried to the court without the intervention of a jury and the court found and rendered its judgment in favor of Jungquist and against the city in the sum of \$2,222.35 and interest thereon at eight per cent per annum from August 26, 1903, and at the same time found and separately stated its findings of fact and conclusions of law. The city brings the case here on error.

1. It is contended, first, that the decision of the court is against the weight of the evidence and the law; second, that the court erred in its seventh finding of fact; third, that the court erred in its third conclusion of law.

It was in issue under the pleadings and the evidence whether prior to and at the time the damage complained of the plaintiff had made his sidewalk and premises to conform to a grade or any grade which had theretofore been established, and his right to recover at all was contested on that ground. Upon this question the court found adversely to the contention of the defendant, but as the evidence was conflicting and also in view of the conclusions reached upon

another branch of the case we do not deem it necessary to discuss the question.

The seventh finding of fact is as follows: "That during the month of September, A. D. 1902, plaintiff presented an itemized account to the board of trustees of the City of Rawlins, setting forth the items of his claim against the said city for damages to his said premises, caused by the grading of the streets adjacent thereto, and that on or about the 31st day of December, A. D. 1902, the said board of trustees in meeting assembled did allow on said bill and account presented as aforesaid to said board of trustees, the following items, to-wit:

To tearing up and damaging said stone pavement, making it unfit for further use.....	\$189.65
To 26 days excavating to sidewalk grade.....	52.00
To relaying board walk in place of stone pavement.	36.00
	<hr/>
Total amount allowed	\$277.65

"And a warrant was issued payable to the plaintiff for said amount. That the balance of the items of the bill were rejected or not acted on by the said board of trustees."

The third conclusion of law is as follows: "That the plaintiff is entitled to a judgment in his favor and against the defendant for the sum of twenty-two hundred and twenty-two and thirty-five hundredths (\$2,222.35) dollars, the same being the amount of plaintiff's damages in the sum of twenty-five hundred (\$2,500.00) dollars, less two hundred seventy-seven and sixty-five hundredths (\$277.65) dollars paid by defendant to plaintiff; and the plaintiff is entitled to interest thereon from the 26th day of August, A. D. 1903, at the rate of eight per cent per annum."

The item for \$900 was rejected by the court by its fourth conclusion of law.

The question here presented is whether the bill for damages presented in September, 1902, the action of the board and the acceptance of the amount allowed thereon by Jung-

quist amounted to a complete settlement of the matters here sought to be litigated. That bill is in words and figures as follows:

"City of Rawlins, County of Carbon, to William Jungquist, Dr. Bill of damages to corner Fifth and Cedar streets, account grading.

1902. To tearing up and damaging of stone pavement, making it unfit for further use....	\$ 189.65
To 26 days excavating to sidewalk grade..	52.00
To relaying board walk in place of stone pavement torn up.....	36.00
To 15 perches of rock wall torn down....	45.00
To lower house to grade.....	877.00
To damages to upper story to date.....	400.00
To damage to basement for month of July.	30.00
	<hr/>
	\$1,629.65"

Regardless of the items, it will be observed that the damage for which compensation is claimed is shown by the bill to have resulted from the same cause. It is designated as a bill for damages to the premises and it was so regarded by the court in its findings. There is no question of the identity of the property or the cause of the damage, and while the suit was not predicated upon any action of the board of trustees on this bill, yet plaintiff's cause of action is inclusive of and for damages referred to in this bill. The court in its finding treated them as identical and credited the amount allowed on this bill upon the amount of damage which it found that the plaintiff had sustained. Upon the record the plaintiff is, therefore, in the attitude of having part of his demand allowed, accepting the amount so allowed and suing for the balance.

Having presented his bill and accepted the amount allowed thereon and there being no express agreement that it should be in satisfaction in whole or in part of the cause of action, the presumption is that it was intended as full recom-

pense for the damage sued for. (*Bowman v. Ogden City*, 93 Pac., 561.) . To overcome such presumption it is not sufficient to show that one of the parties did not so understand it, but it is necessary to show that the minds of the parties were in harmony on that question. Jungquist testified that he did not so understand it. Mr. O'Donnell, who was city clerk, testified upon this subject and said that the first three items of the bill were paid by the delivery of the warrant, that he would say that from the pencil check marks upon them, also that he did not know exactly whether those were the items which were allowed, but that added up they would make that amount, and further that "The board of trustees allow the bills, I draw the warrants." The record of the board of trustees shows that the bill came up for consideration on September 24, 1902, and was laid over, and in the record of the proceedings of the trustees under date of December 31, 1902, is the following entry: "Wm. Jungquist, damages account grading, bill for \$1,629.65, allowed \$277.65." The items of the bill were but elements and component parts of the damage sustained from a single cause. (27 A. & E. Ency. of Law, 143, 144.) The cause of action was single and not severable, and the fair meaning of plaintiff's claim as presented by him is that it was a presentation of his entire demand, and that it was so understood by him is evident from his testimony. Upon cross-examination he was interrogated and answered as follows:

Q. This bill (referring to bill acted on by the trustees on December 31, 1902) was for the same damage, the same claim you are now suing on?

A. No, sir, not at all. The grade had got nothing to do with it.

Q. It hasn't anything to do with the damage you sustained?

A. Yes, sir.

Q. Was this bill for \$1,629.65 for damages you sustained by grading or not?

A. It was tearing up the sidewalk.

Q. Damage you sustained by tearing up the sidewalk?

A. A part of the damage, yes, sir.

Q. You expected when you got all that to put in some more for damage and keep it coming?

A. That's all right. If they had settled the bill there wouldn't have been anything more said about it.

Q. If the city had settled the bill it would have paid you for all damages?

A. To that time, yes, sir.

The trustees in considering the claim must necessarily have considered the question as to whether the plaintiff was entitled to any damages, and the amount of such damage, whether itemized or not, was for them to consider. We are unable to perceive any difference, so far as plaintiff's rights are concerned, between presenting his bill in this form, and from presenting a claim for a lump sum and appearing before the trustees and showing what the elements of damage were and the component parts going to make up such lump sum. The tearing up and relaying the sidewalk was an element of damage occasioned by the lowering of the street to the grade or else plaintiff upon the case was entitled to no compensation therefor. That was an element to be taken into consideration in determining the amount of his damage. (*Holley v. Torrington*, 63 Conn., 426; *Cook v. Ansonia*, 66 Conn., 413; *Pickles v. Ansonia*, 76 Conn., 276; 27 A. & E. Ency. of Law, 141, 142.)

It may be that the damage to his property was greater than he supposed it to be at the time he presented this bill, but neither in the pleadings nor in the evidence does he seek on this ground to avoid the effect of his acceptance of the amount allowed thereon. As already stated, having accepted the part allowed on his bill, the presumption is that he accepted it in full settlement of his claim. The burden was upon him to show a different understanding. (*Bowman v. Ogden City*, *supra*.) The only thing upon which he relies is the fact of there being pencil marks on the first three items of the bill and that those items aggregated the

amount allowed. How, when or by whom they were placed there is not shown, and, as already stated, the items were elements or component parts of damage resulting from a single cause. In *Bowman v. Ogden City*, *supra*, the court say: "In the presentation of his claim the plaintiff was not at liberty to split his demand. He could not present his claim only for a part, and, if it was allowed, accept it and then present another claim for another part." The rule thus announced is, in our judgment, equally applicable to a case where a claim is allowed in part and rejected in part. In California it was held that when a plaintiff sues for a part of an entire demand and recovers judgment therefor that that constitutes a good plea in bar to a future action for the balance of the same entire demand. (*Zirken v. Hughes*, 77 Cal., 235.) The acceptance of the part allowed would be a good defense to an action for the balance. (*Brick v. Plymouth County*, 63 Ia., 462; *Commissioners v. Seawell*, 3 Okla., 281, 287.) In the former case Brick sued the county to recover for professional services rendered to persons afflicted with smallpox and who were confined in a pest house. A part of the bill was allowed by the county and accepted by Brick, and the balance having been rejected suit was brought to recover the amount so rejected. The court say: "It is claimed by counsel for appellant that the acceptance of the allowance made by the board of supervisors is a bar to an action for the balance of the bill which was rejected by the board. The evidence shows that the board of supervisors investigated the claim, allowed a part of it and rejected the balance upon what appears to us good and sufficient grounds. There is no pretense that the plaintiff, when he received the amount allowed him, did not know that the balance had been rejected. Indeed, orders of rejection were written on the bill when it was introduced in evidence in the court below; and the plaintiff in his testimony as a witness, did not deny that he was fully aware of the action of the board of supervisors when he received the allowance made him."

In the case before us, while it is true that the defendant testifies that the warrant was in effect a part payment of the bill, yet he nowhere testifies that that was the understanding when he received and cashed the warrant. While there may be a seeming discrepancy between *Brick v. Plymouth County*, *supra*, and *Fulton v. Monona County*, 47 Ia., 622, the court, in the opinion in the former case, say: "It is contended, however, that a different rule was announced in *Fulton v. Monona County*, 47 Ia., 622. In that case it was not shown that the claimant received the part allowed on the claim with knowledge that the balance had been rejected, and the case is made to turn upon this fact." In *Wapello Co. v. Sinnamon*, 1 G. Greene, 413, a claim had been presented to the county, and part of it allowed and the balance rejected. The court said: "If the plaintiff in this case presented his claim for allowance, and it was in part allowed by the board and he accepted the amount thus allowed, he should not be permitted to afterward sue for the balance. The acceptance of the part allowed should be considered satisfaction for the whole."

In the case before us the claim is for unliquidated damages. The amount of compensation to which the plaintiff was entitled is neither fixed by statute nor by a precedent contract. As already stated, his claim for damages resulted from a single cause. In 1 *Ency. Pl. & Pr.*, at page 148, it is said: "It is a well established rule of law that a single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand." It is further said in the same volume, at page 150, that: "There is no precise rule for determining what constitutes an entire cause of action * * * . It depends upon the facts of each particular case, and is often a difficult question. Certain rules, however, may be formulated." One of the tests which is frequently given is whether the evidence necessary to prove one cause of action would establish the other. (*Hill v. Joy*, 149 Pa. St., 243; *Bigelow on Estoppel*, 44; *Lyon v. Miller*, 24 Pa., 392;

Com. v. Trimmer et al., 84 Pa., 65, 69; Richardson v. Opelt, 69 Neb., 180, 189.) In Stark v. Stair, 94 U. S., 477, 485, it is said: "It is undoubtedly a well settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piece meal, or present only a portion of the ground upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action, that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together."

The rule with reference to damages in the exercise of the right of eminent domain is, we think, peculiarly applicable in this connection. In the exercise of that right there must be (1) a lawful seizure of the property, and (2) just compensation to the party whose property is taken. When a party sues for damages in such a case his right to recover is based upon the wrongful act of denying just compensation for the injury and the action is treated and spoken of in the decisions as for a wrongful act. It is said in Sutherland on Damages (3d Ed.), Sec. 1065, as follows: "The word compensation imports that a wrong or an injury has been inflicted and must be redressed in money." We are not dealing with the subject of a continuing trespass. The act complained of was a completed act. All of the damages resulting from that act were recoverable in a single action. At Sec. 110, id., it is said: "The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings, on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from the principle,

and the rule is fully established, that an entire claim arising either upon a contract or from a wrong cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits of either will be available as a bar in the others." The same author says in Sec. 120, id.: "In the application of the rule that all the damages which pertain to a cause of action, without reference to the time when they actually accrue, are entire and cannot be recovered by piece meal by successive actions, it is frequently necessary to take into consideration damages which have not been actually suffered either at the commencement of the suit or at its trial; for otherwise there would be a very inconvenient postponement of that class of actions or a renunciation of a large part of the compensation due to the injured party. When a cause of action accrues there is a right, as of that date, to all the consequent damages that will ever ensue. They are recoverable in one action if they can be proved, and only one can be maintained; it may be brought at any time after the accrual of the right." In speaking of damages in eminent domain, in 15 Cyc., at page 689, it is said: "It is to be observed that the damages sustained by the owner are a unit, although composed of integral parts, viz.: the value of the land and the injury to the remaining part." At page 703, id., it is also said: "The measure of damages to an abutting owner caused by a change of grade of a street or highway is generally held to be the difference between the value of the abutting property before the change of grade and its value thereafter * * *. Depreciation in the rental value of the property, and interference with the right of ingress and egress are elements to be considered in estimating such damages." The text is supported by an abundance of authorities cited in the foot notes.

In Elliott, Roads and Streets, at page 345, it is said: "The change of grades is a permanent matter and all re-

sulting injury must be recovered in one action, for the property owner cannot maintain successive actions as each fresh annoyance occurs." The author cites in support of the text: *City of Lafayette v. Nagle*, 113 Ind., 425; *City of Vernon v. Voegler*, 103 Ind., 314; *Central Branch R. R. Co. v. Andrews*, 21 Kan., 702. The author further says, on the same page, that this rule "is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain. Grades are changed under a sovereign right closely akin to the right just named and it is in accordance with established practice to apply to such cases the rule which governs analogous cases." The change of grade was an act done by the municipal corporation under a claim and color of right. It was an act permanent and enduring in its character. In *City of Lafayette v. Nagle*, *supra*, damages were sought by an abutting lot owner for changing the grade of an alley. It is there said that there is a plain distinction between a mere transient trespass and an act which both parties treat as of an enduring character. The court say: "In such a case as this, and in all cases where the thing done is done under color of legal authority, and is permanent, the wrong doer, while he may not be vexed with many actions, must pay full compensation to the person he has injured. But the public has an interest in these matters, and that interest demands that when one action will fully settle the controversy and bring the wronged person full compensation one action only can be maintained * * *. Damages to land arising from one permanent wrong, committed under color of legal right, cannot be collected in shreds and patches as each new loss arises, but must be recovered in a single action. It is not the damages alone that constitute the cause of action, for a cause of action is composed of both injury and damages. If there is a single injury—and there can be only a single injury where the thing that causes it is permanent—there can be only one action, for a single injury cannot be dissected into many

parts, and thus made to yield a progeny of actions, limited only by the possibility that a time may come when no new inconvenience or loss can be suffered * * *. When the thing done is permanent the injury is not repeated, and when there is no repetition of an injury there cannot be successive actions."

The settlement of the plaintiff with the defendant without fraud or deception partook of the nature of an adjudication of the differences between them growing out of regrading the streets adjacent to his property. The same proof would be necessary to show the cause of the damage to enable him to recover a part or all of the damage either in one or in separate suits, and the damages sustained were but a unit, although composed of integral parts. The plaintiff submitted his claim to the trustees and invoked their action thereon and accepted the amount which they allowed. He was not bound by their action. He could either accept the amount allowed him or reject it and bring suit upon his claim and litigate it as an entirety. He could not accept and retain the amount allowed and maintain an action for the balance in the absence of an express understanding that it was only a partial allowance.

In *Hunt v. Franklin County Commissioners*, 100 Me., 445 (62 Atl., 213), the plaintiff was present when the board of county commissioners passed upon his itemized bill and allowed a less amount than he claimed; he accepted this amount and by *certiorari* brought the case before the court for review. The court say: "The petitioner urges that the allowance of a lump sum for his itemized bill less than the full amount was illegal. That the commissioners should have allowed or disallowed each item and should be compelled to do so now, in order that he might bring the disallowed item before the court. On the other hand, the respondents claim that *certiorari* is not the proper remedy for the petitioner.

"We have no occasion to consider either of the above contentions, since a complete answer to the petition is made

by the fact that with knowledge that \$100 was allowed him in full for his whole bill, he drew that amount from the treasury and has not returned it. He cannot now reopen the matter. (Perry v. Cheboygan, 55 Mich., 250 (21 N. W., 333); Brick v. Plymouth County (Ia.), 19 N. W., 304; Murphy v. U. S., 104 U. S., 464; 26 L. Ed., 833.) As well might a plaintiff who had collected judgment in a common law action for less than his claim stated, afterward maintain an action on the same claim." In the case before us neither before the commencement of his suit nor at any time during the progress of the trial, though informed of the nature of the defense, did the plaintiff return or offer to return the amount allowed and accepted by him. By his conduct he affirmed the action of the trustees, but contends that it was a part payment only. The evidence of the city taken in connection with the presumption accompanying it cast upon him the burden of showing that such payment was so understood and intended. The evidence wholly fails to support such contention.

We are of the opinion that the decision of the court is against the evidence, under the law applicable to it, and that the court erred in its seventh finding of fact and its third conclusion of law.

The judgment will, therefore, be reversed and the cause remanded to the district court with directions to enter judgment for the defendant, the plaintiff in error here.

Reversed.

POTTER, C. J., and BEARD, J., concur.

ON PETITION FOR REHEARING.

POTTER, CHIEF JUSTICE.

The defendant in error has filed a petition for a rehearing and insists thereby not only that the points involved in the case were incorrectly decided, but that upon the conclusion reached the court should have remanded the cause for a new trial instead of directing judgment.

1. In the brief in support of the petition we find again discussed the effect of plaintiff's acceptance of the amount

allowed by the city upon his bill presented in 1902, and it is again insisted that the circumstances do not show a payment and acceptance in satisfaction of the entire claim. That question is fully considered in the former opinion and but little further comment respecting it seems necessary.

Plaintiff presented to the city a claim for unliquidated damages. So far as this case is concerned he had nothing but an unliquidated demand. Moreover, it seems to have been disputed. At least a part only was allowed, and in this suit upon the claim it was contested upon the ground, among others, that there was no liability on the part of the city for any of the damages alleged. The rule, therefore, to be applied to the allowance and acceptance of a part of the claim is the well settled one that payment and acceptance of a less sum than claimed, in satisfaction of an unliquidated or disputed claim, operates as an accord and satisfaction. (1 Cyc., 329-331; 1 Am. & Eng. Ency. L., 419-420.) That the claim presented was for the entire demand seems to be clear, and was practically admitted by the plaintiff in his testimony. The bill contained several items, it is true, but they were each and all claimed as a result of the same cause or injury, viz.: as damages on account of grading, as stated in the bill, or, as set out in the suit, on account of a change in the grade of the streets adjoining plaintiff's property. That the claim was unliquidated is not denied, nor could it be. That part had been allowed and accepted is conceded. The only controverted question of fact, therefore, in reference to this matter was and is whether the payment and acceptance was in full satisfaction of the damages claimed. The solution of that question depends upon the evidence and the inferences to be necessarily drawn therefrom.

The evidence upon the question, though meager, is not conflicting. It consists principally of the bill as presented, the record of the action upon it by the city trustees or council, and the warrant drawn and delivered to and accepted by the plaintiff. In addition, the plaintiff testified in answer to a question upon cross-examination that the bill upon

which the allowance was made was not for the same claim or damage for which he was suing, and that the grade had nothing to do with that bill; but following that he gave the testimony quoted in the former opinion admitting in effect that the bill embraced his entire claim for the damages sued for, and we do not understand that it is now contended otherwise. It is, however, contended that the allowance by the city was in payment only of certain items of the bill, and that the remainder of the bill was not considered, or that if it was considered and rejected the plaintiff had no notice thereof.

In support of the theory that the allowance had reference to particular items only, reliance is placed on the fact that opposite each of the first three items appeared a pencil check mark, and that the aggregate of those items equals the amount allowed. But the check marks are totally unexplained. We cannot assume that they were made by any one connected with the city government, or that they were placed upon the bill before or at the time of its consideration by the trustees. They, therefore, prove nothing. The fact that the total amount of the three items equals the amount allowed might be of some importance depending upon the circumstances. It is apparent that the board might have regarded the damages claimed by those items as representing all to which the plaintiff was entitled in any event, or that to settle a disputed matter it was willing to allow the amount of those items and no other amount. But in the present state of the evidence the intention must be gathered from that which was done. And it is the duty of the court to ascertain the necessary inferences from the evidence.

It has been said that the bill embraced plaintiff's entire demand. We think it equally clear upon the evidence that the city board treated and considered it as an entirety. In each entry in the record of the board the bill is referred to as one for a specific amount of damages account of grading, the amount mentioned being the total amount of the bill. It is not otherwise referred to, and such description is fol-

lowed in the entry of December 31, 1902, by the words "allowed \$277.65." This entry is not otherwise explained, and upon its face is to be construed, we think, as showing a consideration of the entire bill and an allowance of a less sum than claimed, and thus the necessary inference or presumption of fact is that the remainder was rejected, and that the allowance was in full compensation for the damages claimed.

If in fact the city board allowed the amount accepted as full compensation, and that, we think, is the effect of the evidence, considering the nature of the claim as well as the record entries showing the board's action, the plaintiff, in the absence of anything to the contrary, must be presumed to have known it when he accepted the payment. It does not appear that he made any inquiry about it, but we have the bare fact that he accepted the warrant and received the money it called for. And the warrant recited on its face that it was for damages by grading. In considering his action in the premises, as well as that of the board, the discussion in the former opinion is pertinent with reference to the character of the claim and cause of action. It is not necessary to repeat what is there said respecting it. If the plaintiff was entitled to any portion of the amount claimed in his bill it was because of the injury to his property through a change in the grade of the streets. He had a single cause of action, and, though various things might be considered in estimating the damage under the usual rule of the difference in the value of the property before and after the change of the grade, they are in that sense merely elements of a single and inseparable damage. The plaintiff seems to have so understood it, since his bill was headed, "Bill of damages acc. grading." The case of *Fulton v. Monona County*, 47 Ia., 622, is not opposed to the view we have taken. In that case, involving a bill for services and expenses of a superintendent of schools, the court held that upon the evidence the conclusion was authorized that the claimant had grounds to believe that the

board had not finally and fully rejected her claim so far as it was in excess of the amount allowed, but had it under consideration, and hence it was said that the plaintiff could not be presumed to have received the warrants with knowledge that they had been allowed in full of her claim.

There seems to be some misconception in the mind of counsel regarding the references in the former opinion to the law concerning the splitting of a single cause of action for the purpose of suit, and it is protested that plaintiff has not divided his cause of action, nor sued for part in separate suits. It was not supposed that he had. The discussion upon that subject in the opinion was relevant to the determination of the effect of the allowance and acceptance of a part of his claim. It seemed to be proper to explain that the claim upon which the allowance was made was not composed of disconnected items founded upon separate contracts or injuries, but that all the items went to make up the aggregate amount of the damage claimed to have resulted from a single injury, and that the transaction as to the allowance and acceptance was to be considered from that viewpoint.

Upon the evidence, therefore, in our opinion, the finding of fact was not justified that the allowance by the board had reference merely to the first three items of the bill. The finding was in the alternative as to what was done with the remainder of the bill, viz.: that "the balance of the items were rejected or not acted on by the said board of trustees."

The view we have taken of the question does not impose upon the plaintiff below the burden of proof in the first instance to negative a satisfaction of the claim through his acceptance of the warrant, but only to overcome the effect of the defendant's evidence, which upon principle and the authorities was sufficient *prima facie* to show a settlement and satisfaction of the claim sued on.

2. It is further insisted that accord and satisfaction is insufficiently pleaded in the answer to authorize the admis-

sion of evidence in support of such defense; and it is argued that the question was raised by objection to the evidence when offered. The objection in this particular is that the answer instead of pleading the facts states a conclusion of law.

In the first place it is doubtful, to say the least, whether the question was raised by any objection to the evidence. The only objections as to this matter which we find in the record are these: When the city clerk was testifying for the defense, having without objection read from the records of the board the action taken upon the bill of plaintiff on September 24, 1902, he was asked to turn to another page. An objection was then interposed "to this procedure on the ground that it calls for a legal conclusion and is irrelevant." The objection was overruled and an exception taken. Without further objection the witness was allowed to read the subsequent record of December 31, 1902, showing the consideration of the bill and the allowance thereon. When the warrant was offered, the plaintiff's counsel objected without stating any ground. It was overruled and an exception taken. The warrant was thereupon admitted in evidence, and immediately thereafter it appears that the plaintiff offered to introduce his claim that had been presented to the city in the amount of \$1,629.65, on which was paid \$277.65, the clerk not then having the same in his possession, and leave was granted the plaintiff to introduce it at any time before the conclusion of the case. The clerk was afterwards recalled for further cross-examination, and, having the bill in his possession, he was interrogated respecting it. Upon that examination was brought out the fact of the presence of the check marks upon the bill. Thus it appears that the insufficiency of the answer was not directly suggested by any objection to the evidence, unless it may be supposed that it was argued in support of the objections that were interposed, but the record is silent upon the matter except as above stated.

The answer contains two separate defenses. In each there is an allegation of the allowance in question as full

compensation for all damages claimed, and the acceptance by the plaintiff of the amount allowed. The presentation of the bill is alleged, the action taken on September 24, 1902, laying it over for further consideration, and that on December 31, 1902, the board considered it, and upon a full consideration thereof allowed to the plaintiff the sum of \$277.65 "as full compensation for all damages done to the property of plaintiff by reason of any action of the City of Rawlins in grading the streets adjacent to his property;" that upon the allowance a warrant was issued in favor of the plaintiff for the said sum allowed "as full compensation;" and that the same was delivered to said plaintiff and accepted by him; that he presented it for payment and was paid the amount thereof out of the city treasury. That is the substance of the allegations as to this matter in each defense, except that it is alleged additionally in the second defense as follows: "and said plaintiff accepted the same (the warrant) and received the money thereon out of the treasury of the said City of Rawlins, defendant herein, and thereby compromised and settled any and all claims for damages that he might or did have against the said City of Rawlins by reason of any grading of the streets adjacent to his property by said city."

Briefly stated, the method or form generally laid down in the books and approved by the courts for pleading accord and satisfaction is to allege that the thing delivered or money paid was delivered or paid to the plaintiff and received by him in full satisfaction and discharge of his said cause of action, or the claim set forth in the petition. (1 Kinkead's Code Pl., p. 140; 2 Bates Pl. Pr. Par. & Forms, 860; Baldwin v. Bank, 1 O. St., 141; Leavitt v. Morrow, 6 O. St., 71, 72; 1 Ency. Pl. & Pr., 76, notes 3-5.)

The answer alleges as a fact, and in that respect it seems to be unassailable, that the bill was considered by the board and a stated amount allowed thereon and a warrant for the amount delivered to the plaintiff as full compensa-

tion for the claim sued on. It is also alleged as a fact that the warrant was accepted by the plaintiff, and that he received from the city treasury the amount thereof, but it does not seem to be directly alleged that the plaintiff accepted or received the warrant or money as full satisfaction of his claim or cause of action, unless the averment that "plaintiff accepted the same" is to be construed to mean that the acceptance was of the warrant for the purpose for which it was alleged to have been issued, viz.: as full satisfaction; it being alleged that "in accordance with allowance a warrant was issued * * * payable to said plaintiff in the sum of \$277.65, and the said plaintiff accepted the same," etc. But in the second defense, following and as a part of the averment of acceptance is the allegation "and thereby compromised and settled any and all claims for damages," etc. This last allegation may be and, perhaps, should be held to be, a statement of a conclusion of law, and as such, upon a proper objection, an imperfect and insufficient averment of the fact of acceptance in full satisfaction and discharge of the cause of action.

However, the parties went to trial upon the answer without objection to its sufficiency; it alleging a compromise and settlement through the payment and acceptance of a stated amount and that the payment was made as full compensation. Where no objection to a pleading on the ground of its insufficiency has been made before trial, the most liberal construction will then be adopted to sustain it if possible, and the objection will not then be sustained unless there is an entire omission of a material fact or a total failure to state a cause of action or defense. (1 Bates Pl. Pr. Par. & Forms, 458, 459; Holz v. Hanson, 115 Wis., 236; Pomeroy's Rem., Secs. 549-551; Ry. Co. v. Stone (Kan.), 37 Pac., 1012; Johnson v. Anderson (Kan.), 57 Pac., 513.)

In the case last cited it was said:

"The sufficiency of the petition was raised by an objection to the introduction of any evidence under it. This

method of attack is not favored, and the allegations of the petition will be construed liberally, for the purpose of sustaining it."

And in *Railway Co. v. Stone*, *supra*, no demurrer or motion having been interposed, but the objection to the petition being first raised by an objection to evidence, it was said: "If the facts are all stated, even indefinitely or in form of conclusions, a petition will be regarded as sufficient." Pomeroy says in Section 549 of the work above cited: "Thus, if instead of alleging issuable facts the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or, if he should aver conclusions of law, in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer." And again, in Section 551: "If the pleading was not reformed, and if the defect was not so serious as to render it demurrable, it would be treated on the trial as sufficient; and the statement of probative matter or of legal conclusions would take the place of the issuable or material facts which ought to have been averred, and would thus become material."

It having been averred that the city allowed the amount stated as full and complete satisfaction, the answer states in a single sentence that "in accordance with allowance" a warrant was issued, and the plaintiff accepted the same; and the sentence concludes with the averment above quoted that the plaintiff thereby compromised and settled the claim. Giving to the allegation the liberal construction required, there is not a total failure to allege the material fact that the warrant and money were received in full satisfaction and discharge of the claim. That the allowance was in full satisfaction is alleged, and it is also alleged that the warrant was issued and accepted in accordance with the allowance. Though the remainder of the allegation may be a conclusion of law, it supports the inference that the acceptance as well

as the payment was in full satisfaction of the claim. As against an objection upon the trial to the introduction of evidence the answer must, therefore, be held sufficient.

3. In accordance with the direction contained in the former opinion an order was entered remanding the cause with directions to the district court to render judgment for the defendant below, the plaintiff in error here. It is now urged that such order was improper in view of the grounds upon which the reversal was based, and that the cause should be remanded for new trial if the order of reversal is adhered to. At the court's request counsel for plaintiff in error has submitted a brief upon that question, opposing any modification of the order. We have carefully considered the matter and have concluded that the objection to that part of the order which directs the entering of judgment without a new trial is well taken.

The judgment was reversed for the insufficiency of the evidence to sustain the finding of fact that the city authorities had allowed the first three items of the bill without reference to the remaining items. The effect of the finding as we think it must be construed is that the three items aforesaid were separately considered by the trustees, and upon such consideration allowed. The error of the court, therefore, was primarily in the finding of fact, and in denying the motion of defendant below for a new trial. Even in such a case we suppose an appellate court might be justified in directing the proper judgment to be entered, where it appears that all the facts are shown by the evidence and are not disputed, but the course taken should be such as will appear to best promote the ends of justice. (3 Cyc., 454, 455.) Under our practice and in this case the defendant below raised the question of the sufficiency of the evidence to support the finding of fact by a motion for new trial, and that motion ought in our opinion to have been granted, so that error was committed in overruling it. It is not apparent to us that there may not be other competent evidence tending to throw light upon the point in issue,

and, therefore, the logical procedure would seem to be the remanding of the cause for a further trial, in view of the error forming the ground of the reversal.

In *Gay v. Davey*, 47 O. St., 396, the court say: "Material facts necessary to sustain the judgment were in issue between the parties. The main ground upon which the defendants predicated their motion to set aside the judgment and for a new trial was that the finding of the court was against the weight of the evidence. When the reviewing court reversed the judgment of the court below for error in overruling such motion, the only judgment which should have been rendered after reversal was to grant a new trial, as moved in the trial court. * * * For aught appearing to the contrary, upon remanding the cause for further proceedings, any unavoidable defect in the evidence on the hearing might, in furtherance of justice, have been supplied in a second trial."

It is suggested in the brief of counsel for plaintiff in error that it would not be competent to explain the record of the city board or alter its effect by parol testimony. We think it unnecessary as well as improper to decide or consider that question. It will be time enough to do so when evidence of that character for such purpose is offered or admitted. But if the contention be correct we are not in a position to say that there may not exist other entries in the record of the board showing its action in the premises, not appearing in the present record, or at least some competent facts pertinent to the issue.

However, the insufficiency of the evidence to sustain the finding is not the only point to be here considered upon this inquiry. The trial court failed to make a definite finding upon a material fact, viz.: the action of the board of trustees with reference to the remainder of plaintiff's bill. It is true that upon the evidence presented we are of the opinion that the only proper finding would have been that the part of the bill not allowed was rejected. Nevertheless, the trial court made no finding as to that matter, and hence the findings did

not definitely determine the facts necessary to support the court's conclusions of law. The finding in that respect was in the alternative, that the remainder of the bill was either rejected or not acted on. Citing a large number of cases, it is said at page 456, in 2 Cyc.:

"On setting aside a judgment in an action at law, the appellate court will not undertake to render or order final judgment where the facts in issue are controverted or not definitely settled, but will order a new trial. And so, where the facts have been found so imperfectly as not to authorize a judgment thereon, the appellate court will remand the cause for further proceedings."

In order to render or order a judgment in the case at bar, it would be necessary for this court not only to make a finding as to a fact apparently not considered by the trial court, but also to substitute a finding for the one erroneously made by the trial court. The order previously entered directing judgment was an inadvertence and in our opinion improper under the circumstances, and it should be modified so as to remand the cause for a new trial. It will be so modified, and the petition for rehearing denied.

BEARD, J., and SCOTT, J., concur.

RICHTER V. STATE.

ANIMALS—INSPECTION AND QUARANTINE OF SHEEP—POLICE REGULATIONS—STATUTES—AUTHORITY OF SHEEP INSPECTOR—REMOVING SHEEP BEYOND QUARANTINE LIMITS—PROSECUTION—QUESTION FOR JURY—INSTRUCTIONS—EVIDENCE.

1. The statute providing for the inspection of sheep and the quarantine of such animals as are infected with or have been exposed to an infectious or contagious disease is essentially a police regulation, and the power thereby conferred upon sheep inspectors is therefore not inhibited by the constitution.

2. The sheep inspector is the agent of the state for the enforcement by inspection and quarantine in authorized cases of the police regulations relating to sheep.
3. The power conferred upon sheep inspectors to inspect and quarantine sheep cannot be used arbitrarily or oppressively, but only in the cases and in the manner provided by statute, which, being penal in its nature, must be strictly construed.
4. The authority of the sheep inspector to declare and establish a quarantine for sheep rests upon the fact that they are either infected with or have been exposed to a contagious disease mentioned in or covered by the statute.
5. The mere fact that certain sheep are suspected of being infected with an infectious or contagious disease does not authorize an inspector to quarantine them, but only to inspect them, and the authority to quarantine then depends upon the result of such inspection, and exists only when such sheep are found to be infected, or to have been exposed to an infectious or contagious disease.
6. The acts of a lawful sheep inspector beyond and outside the authority reposed in him by statute are void. He acts summarily, and is authorized to quarantine sheep only when a cause provided therefor by statute exists.
7. In a prosecution under the statute for removing sheep beyond quarantine limits established by an inspector for such sheep the defendant is not precluded from showing that the necessity for the quarantine did not exist, nor is he required to go into that question until the state has made out a prima facie case.
8. In such a prosecution the inspector is not the sole judge as to whether the sheep had been exposed to disease when that was the alleged cause of the quarantine, but the question is one for the jury.
9. Instructions to the effect that the inspector is the sole judge as to whether the sheep alleged to have been removed beyond quarantine limits had been exposed so as to justify their quarantine, and that the inspector had power to quarantine sheep which were suspected of being infected with an infectious or contagious disease, held to be prejudicial and reversible error.
10. In order to convict a defendant upon the charge of removing sheep from quarantine limits established for them by an inspector, it is necessary for the prosecution to show by competent evidence that the sheep were either infected or had been exposed to an infectious or contagious disease mentioned or covered by the statute.

[Decided April 21, 1908.]

(95 Pac., 51.)

ERROR to District Court, Big Horn County, HON. CARROLL H. PARMELEE, Judge.

Paul Richter, having been found guilty of removing certain sheep belonging to him from quarantine limits established for them by a sheep inspector, prosecuted error. The material facts are stated in the opinion.

Ridgely & West, for plaintiff in error.

The statute must be strictly complied with to establish a legal quarantine. If there was no legal quarantine the verdict and judgment is contrary to law. To show a legal quarantine the evidence should be competent; hearsay evidence is improper. (15 Ency. L. 309, 310.) A mere suspicion of infection does not authorize a quarantine. Whether the sheep had been exposed to disease or not was properly a question for the jury, and the instruction that the inspector is the sole judge as to whether or not there had been an exposure was erroneous. It invaded the constitutional right of trial by jury, and substituted for the verdict of the jury the opinion of the inspector, who admitted that he acted upon information received from outside parties. The quarantine officer must act upon competent evidence. His acts are not conclusive. (U. S. v. Wittberger, 5 Wheat. 76; U. S. v. Harris, 177 U. S. 305; Hardwick v. Brookover, 30 Pac., 21; Asbell v. Edwards, 66 Pac. 641; *In re* Smith, 48 Am. St. 769; Pearson v. Zehr, 32 id. 113; People v. Board, 37 id 522.)

W. E. Mullen, Attorney General, for the State.

When the sheep inspector acts, either upon his own motion, pursuant to the rules promulgated by the board of sheep commissioners, or upon the written request of a sheep owner and tax payer as provided under the provisions of Sec. 2027, he may, under the provisions of Sec. 2027 and 2022, R. S., and in the exercise of a sound discretion, do any one of the following things. 1. Release the sheep if he finds them free from infection, contagion, or exposure of any kind. 2. Quarantine the sheep and order them treated

as soon as possible if found to be infected. 3. If not infected, but found to have been exposed, quarantine them for a period until symptoms of disease develop or until released by order. In the case at bar, the inspector acted well within the statute and rules, as shown by the evidence, in establishing a quarantine for this band of sheep, without ordering the owner thereof to dip or treat them.

The contention that a quarantine may be established only where the facts as to infection or exposure are shown according to the rules of evidence governing judicial proceedings is untenable. No such rule has ever been held to apply to health officers in the discharge of their duties. (*State v. Rasmussen*, (Idaho) 59 Pac. 936; *Kopalla v. State*, (Wyo.) 89 Pac. 579.) Whether a quarantine had been in fact established by the inspector, and whether or not it had been violated by the defendant were material questions for the jury to decide. But whether the inspector exercised good or bad judgment in the establishment of the quarantine was not a question for the defendant to decide in the first instance, or for the jury on the trial.

Instruction No. 7 informed the jury that they were not the judges as to whether the sheep had been exposed, but that the inspector was the sole judge. Unless our quarantine laws are to be placed in the hands of juries before action can be taken, this instruction was undoubtedly a correct statement of the law. It is a well established principle that the acts of an administrative officer, clothed with discretionary powers and acting within the scope of his authority, cannot be questioned by the courts, unless negligence, fraud, or an abuse of power is alleged and proven. (*Mechem Pub. Off.*, Secs. 611, 613, 614; *Hannon v. Agnew*, 96 N. Y. 439; *Appel v. State*, 9 Wyo. 202.)

SCOTT, JUSTICE.

The plaintiff in error was convicted of a misdemeanor and brings error.

It appears from the record that Richter was and had been for many months prior to June 28, 1906, the owner of a

band of sheep which was kept and grazed upon the open range in Big Horn County. On said date a sheep inspector inspected the sheep and found that they were not infected with any disease, but acting on information to the effect that the sheep had been exposed to "scab" placed them in quarantine within certain limits fixed by him. The herder who was in charge of the sheep was duly notified and such notice was communicated to Richter who disregarded the notice and without permission of any inspector removed the sheep from the quarantine limits and herded them back upon the open range.

The court over the objection of the defendant gave to the jury instructions 1, 5, and 7, respectively as follows:

"1. You are instructed that under the law of this state whoever being the owner of sheep removes the same beyond the quarantine limits that may have been prescribed by any lawful inspector, is guilty of a misdemeanor."

"5. You are instructed that under the law of this state an inspector, either Federal or State, has authority to inspect and quarantine sheep affected with infectious or contagious diseases, or suspected of being so infected, or that have been exposed to any such disease."

"7. You are instructed that the jury are not the judges of the question as to whether or not the sheep in controversy had been exposed, but that the inspector is the sole judge of whether or not there has been an exposure."

It is urged that these instructions did not correctly present the law of the case to the jury and that the defendant was thereby prejudiced. The determination of this question involves a discussion of what powers are conferred upon a sheep inspector.

The Board of Sheep Commissioners consists of three members appointed by the Governor (Sec. 2074, R. S. 1899) who after qualifying choose their president from its members, and who are authorized to appoint a secretary. (Sec. 2076 id.) The board is authorized (Sec. 2077, R. S. 1899 as amended Chap. 98, S. L. 1905) to divide the state into

districts for inspection and appoint such inspectors as it may deem necessary in the manner as the board may provide by its rules and regulations; and to do and cause to be done all things practicable to protect the sheep of the state from disease, "and it shall prepare and promulgate such rules and regulations as it may deem necessary for the quarantining and dipping of sheep infected with scab, or any other infectious or contagious disease, or that have in any manner been exposed to any such disease and for the speedy and effective supervision among sheep as are not in conflict with the provisions of this chapter and also of Chapter 7 of the Revised Statutes of Wyoming 1899." Sec. 2087 as amended and re-enacted Chap. 98, S. L. 1905 is, as follows: "Any inspector, either Federal or State, shall have authority to inspect and quarantine and treat sheep affected with contagious or infectious disease, or suspected of being so affected, or that have been so exposed to any such disease, and such sheep inspector may be called upon, in writing, at any time, by one or more sheep growers owning sheep and paying taxes in such county, to inspect any band of sheep in his county. Upon such request being received by such inspector, he shall forthwith proceed to inspect the sheep mentioned in such request. If he shall find them free from scab or other infectious or contagious disease, the expense of such inspection shall be paid by the party making such request. If he shall find upon such inspection that any of such sheep are infected with scab or any other infectious or contagious disease, or have been exposed in any manner to any such disease, the expense of inspection shall be paid by the owner of such sheep, and such inspector shall take the steps in relation to said sheep provided in the next succeeding section of this chapter." The next section, being Section 2088 of the R. S. as amended and re-enacted, provides in part that: "Whenever, upon examination by such inspector any flock of sheep kept or herded in the State of Wyoming shall be found infected with scab or any other infectious or contagious disease or that have

been exposed in any manner to any such disease, such inspector shall forthwith notify the owner or person in charge of such sheep in writing" and in such case may require that such sheep be kept within certain limits, to be by him fixed and specified, and that other sheep owners shall not enter upon such quarantined ground with their flocks of sheep until further notice or their sheep will also be quarantined. It is also provided that the owner or owners, person or persons in control of sheep so quarantined who shall fail to keep them within the quarantine limits until properly released shall be guilty of a misdemeanor.

It will be observed that the inspector's authority to quarantine sheep is expressly conferred by statute, and in the matter of quarantining sheep because infected with or because they have been exposed to infectious diseases he is the agent of the state. A conferred power of this nature is not inhibited by the constitution because it is the method and practically the only method by which the state can enforce its police regulations. The law is essentially of that nature and the protection sought and the object to be attained must be by a summary method and the state must act and act quickly through its agents who are clothed with certain powers in the performance of the duty. The power can not be used arbitrarily nor oppressively but only in such case and in the manner prescribed by the statute, which being penal in its nature must be strictly construed. We doubt if the legislature has the power to lodge in one man or set of men the authority to deprive a man of his right to the control and custody of his sheep because the inspector or any one else suspects that they are infected with scab. The inspector has not only the right but it is his duty to inspect the sheep, and if competent to do so it is an easy matter for him to determine whether they are infected or not. Section 2087, *supra*, as amended says in the first part that the inspector shall have authority to inspect and quarantine and treat sheep "affected with contagious or infectious diseases or *suspected of being so af-*

fected or that have been so exposed to any such disease." We think the section should be considered as a whole and in connection with the other provisions of the act. The latter part of the section expressly provides that if he shall find upon such inspection "that any of such sheep are infected with scab or any other infectious or contagious disease, or have been exposed in any manner to such disease * * * such inspector shall take the steps in relation to said sheep provided in the next succeeding section of this chapter." The next section being 2088 of the R. S., as amended, provides only for the quarantine of sheep found upon such inspection to be infected with scab or any other infectious disease, or that have been exposed in any manner to any such disease. Section 2100 as amended reads as follows: "All misdemeanors under section two thousand and eighty-eight, two thousand and ninety-three, two thousand and ninety-four and two thousand and ninety-five shall be punishable by a fine of not less than twenty-five dollars nor more than five hundred dollars, and all misdemeanors under sections two thousand and eighty-nine and two thousand and ninety-one shall be punishable by a fine of not less than five hundred nor more than two thousand dollars, and all such fines when collected shall be paid into the treasury of the county."

Under Section 2088 there is no authority to quarantine sheep except for the causes therein stated. The causes for which sheep may be placed in quarantine limits are expressly enumerated and the misdemeanor therein defined consists in the removal of the sheep from such limits without a permit from the inspector after they have been duly quarantined. As no penalty is provided by the act for the removal of sheep from quarantine limits except when quarantined for specific causes we think the failure to provide such penalty excludes the idea that it was the legislative intent that the inspector had authority to establish a quarantine for any other cause.

That a mere suspicion of infection was not intended to authorize a quarantine, but merely an inspection to deter-

mine the fact of infection is further evident from the provision of Section 2087 that if upon such inspection the inspector "shall find them free from scab or other infectious or contagious diseases, the expense of such inspection shall be paid by the party" requesting the inspection.

We are of the opinion that Section 2087 was meant to define the duties of the inspector which are preliminary in their nature and that the two sections considered together in connection with sections 2077 and 2100 as amended do not contemplate the quarantining of sheep because suspected of being infected, but that the inspector has the power to inspect when so suspected and the authority to quarantine depends upon the result of such inspection and exists only when the sheep are found to be infected or to have been exposed to such infectious or contagious diseases. Any other construction would place an arbitrary power in the hands of the inspector which the law does not permit and the exercise of which might in many instances result in oppression and injustice. The jurisdiction of the inspector to declare and establish a quarantine for sheep rests upon the fact that they are either infected or have been exposed to such diseases as are enumerated by the statute, and this power should not be confounded with his authority to inspect in order to determine whether the conditions exist upon which a legal quarantine may be established.

Instruction number five was therefore erroneous, for by it the jury were told that the inspector had power to quarantine sheep which were suspected of being infected with infectious or contagious diseases, when no such power is conferred by the statute.

We have no doubt that instruction number one either standing alone or unaided by other proper instructions is erroneous. When considered in connection with instruction number seven the error by a construction of the two is quite apparent. It is not always true that the owner of sheep who removes them beyond quarantine limits that

may have been prescribed by a lawful inspector is guilty of crime. The inspector may be a lawful inspector and yet if he acts beyond and outside of the authority reposed in him by statute his acts are void, for in such case he has no jurisdiction to act. He is clothed with quasi judicial power. He acts summarily and is authorized to act only when certain causes exist. He should inform himself of the existence of one or the other of these causes. It is true that the statute is silent as to the manner and method of obtaining the information. The inspector is neither empowered to take testimony nor to administer an oath. In *People v. Board of Health*, 140 N. Y., 1, 37 Am. St., 523, certiorari was brought to review the proceedings of the board of health declaring that certain dams across a river were a nuisance and ordering their removal. There was no provision for a hearing before the board on the part of any person who was charged with maintaining a nuisance upon his premises. The court say: "Boards of health, and other like boards, act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a determination."

The action of the inspector in quarantining the sheep did not conclude the defendant from showing that the necessity therefor did not exist, nor was the defendant required to go into that question until the state had made out a *prima facie* case. The inspector was not the sole judge nor could he pass judgment in this proceeding upon the question as to whether or not there had been an exposure. The issue was as to whether the defendant had violated the quarantine and if there had been no exposure, it being conceded that the sheep were not infected, there was no quarantine to violate for the act of the inspector in attempting to establish such quarantine would be illegal and unauthorized. The statute does not in terms make the decision of the inspector

final upon this question. We are not obliged to hold that it does. If it did its application to this case would be an invasion of the constitutional rights of the defendant. Without due process of law neither his property, personal rights or liberty can be interfered with. (Sec. 6, Art. 1, of the Constitution; *People v. Board of Health, supra.*) In the last named case it is said: "Boards of health under the acts referred to cannot as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim *omnia praesumuntur legitime facta donec probetur contrarium.*"

In the case before us the act of the inspector may have been presumptively valid until the plea of not guilty was interposed. Such plea questioned the validity of the quarantine and thenceforth such presumption ceased to exist. The burden of proof was not shifted to the defendant, but as in all criminal cases rested upon the state to prove every essential element constituting the crime charged. One of the elements was that a valid quarantine had been established—that is to say, a quarantine which is authorized by the statute.

In *Troy v. State*, 10 Tex. App. 319, an act provided for the appointment of inspectors of sheep in certain counties and defined their duties. One of the sections provided that whenever an inspection of a flock or herd of sheep under the provisions of the act disclosed the presence of "scab" or other infectious or contagious disease it should become the duty of the inspector to notify at once the owner or person in charge, and prescribe certain limits within which the flock should be herded until cured. Another section

provided that any owner or person in charge who shall wilfully or knowingly fail to comply with or violate any of the provisions of the act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined, etc.

The similarity of the above provisions with those of our statute is apparent. Troy was convicted of a violation of the provisions of the statute in failing to keep his sheep within the limits prescribed by the inspector. He assigned as error the refusal of the court to instruct the jury as follows: "If the jury believe from the evidence that the sheep of the said C. W. Troy did not have the scab they will find him not guilty. If the jury believe from the evidence that the defendant did not wilfully violate the law in keeping the sheep within the limits prescribed by the inspector, you will find him not guilty." The court say: "If * * * the sheep of the defendant were infected with the disease called scab, and he had been properly notified of that fact, and limits had been prescribed within which the sheep should be kept until cured, and the defendant had wilfully and knowingly violated the provisions of the act as charged, then he would be guilty of a misdemeanor, but if not, then he would not be guilty. Hence, in our opinion, it was a material inquiry whether the defendant's flock of sheep had scab or not, and whether, this being the case, he had wilfully or knowingly failed of his duty in the premises; and the jury should have been so instructed in substance, as requested by the defendant's counsel." The judgment was reversed upon the ground of error in refusing to give the instruction so requested.

In the case before us the sheep were not quarantined on the ground that they were infected with scab or any other contagious disease but upon the ground that they had been exposed thereto, and as held in a former part of this opinion they could be inspected if suspected of being so infected or if they had been exposed. Whether or not they were infected with scab or had been exposed to such infection so as to authorize the inspector to place them within

quarantine limits is, we think, upon principle and authority a material inquiry for the jury in a prosecution of this kind and that the court by instruction number seven took this question from the jury and that in so doing it committed error prejudicial to the defendant.

There are other questions presented by the record as to the admissibility of hearsay evidence upon which the inspector acted. We do not deem it necessary to here discuss those questions in view of a new trial further than to say that this kind of testimony was evidently deemed competent upon the erroneous theory upon which the case was tried. To establish the fact that the sheep were either infected or exposed to the infection of diseases enumerated in the statute calls for competent evidence the same as it does to establish any other fact in the case. The existence of one or the other of these causes is necessary to the establishment of a valid quarantine, and in the absence of both the defendant would not be guilty of the charge contained in the information even though the inspector acted in good faith and upon evidence which seemed to him satisfactory. His judgment could not in this action be substituted for that of the jury.

For error in giving instructions 1, 5 and 7 to the jury the judgment will be reversed, and the case remanded for a new trial.

Reversed.

POTTER, C. J., and BEARD, J., concur.

CLAUSE, ADMINISTRATOR, ETC. v. COLUMBIA SAVINGS AND LOAN ASSOCIATION.

BUILDING AND LOAN ASSOCIATIONS—EFFECT OF AN ESTIMATE OF TIME REQUIRED TO MATURE SHARES—LOANS—CONTRACT OF BORROWING SHAREHOLDER—CONSTRUCTION—BURDEN OF PROOF AS TO MATURITY OF STOCK—STATUTE OF LIMITATIONS—NEW ACTION AFTER FAILURE OTHERWISE THAN ON THE MERITS—SUMMONS—SERVICE BY CORONER—JURISDICTION—PERIOD OF LIMITATION ON DEBT PAYABLE IN INSTALLMENTS—EFFECT OF OPTION TO DECLARE ENTIRE DEBT DUE AND PAYABLE UPON PARTIAL DEFAULT—ALLOWING CREDIT FOR BORROWER'S STOCK UPON DEBT TO BUILDING ASSOCIATION.

1. Where the by-laws of a mutual building and loan association provide that its stock is to be matured by the equal application to all of it, or all of a series, of the monthly dues and profits, and that it will mature whenever the amount to its credit shall equal its par value, a mere estimate of the time which will be required to mature the stock plainly stated as an estimate in the by-laws and printed circulars of the association, does not bind the association to mature its stock within the estimated period, or limit the period for the payment of dues.
2. The by-laws of a mutual building and loan association provided that its stock should mature whenever by the equal application thereto of the monthly dues and profits the amount to its credit should equal its par value, that shareholders not obtaining loans should pay monthly a stated sum on each share, and that borrowing shareholders should pay monthly "until the stock borrowed upon shall have matured and the loan is thereby repaid" one seventy-second of the sum borrowed (less the membership fee) also interest at the rate of three per cent per annum upon the original amount of the loan. *Held*, that the section relating to payments by borrowing shareholders is not to be construed as providing for liquidating the indebtedness with 72 monthly payments or for merely three per cent interest on the loan, but for a continuance of the required monthly payments until the maturity of the stock; that the interest to be paid for the use of the money advanced is that portion of the monthly payment in excess of the regular stock dues; and, therefore, that the obligation of a borrower under his contract to make the stated monthly payment

until the stock borrowed upon shall have matured and the loan is thereby repaid is not terminated upon making the payments for a period of 72 months, unless the stock has matured.

3. Where the issuance and service of a summons in an action is sufficient to confer jurisdiction over the person of the defendant the action will have been commenced, the proceeding being otherwise regular, although the service is afterwards quashed, within the meaning of the statute (Sec. 3465, R. S. 1899) providing that if in an action commenced in due time the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such failure expired, the plaintiff may commence a new action within one year after such date.
4. To have the effect of failing to give jurisdiction a summons or the service thereof must be so radically defective that it would authorize a collateral impeachment of a judgment rendered thereon.
5. The coroner being authorized to serve process where the sheriff is a party to the action, the service by him of a summons will not render the judgment void and thus throw it open to collateral impeachment, although it may have been irregular and a ground for quashing service upon objection that the sheriff was improperly joined as a party defendant.
6. Where the service of summons by the coroner is quashed because the sheriff was improperly joined as a party defendant there is a failure by the plaintiff otherwise than upon the merits within the statute authorizing in such case where the action has been commenced in due time the commencement of a new action within one year after the date of such failure if at the date thereof the time limited for the commencement of such action has expired.
7. Where, through the quashing of the service of summons, there has been a failure by the plaintiff otherwise than upon the merits in an action commenced in due time, and at the date of such failure the time limited for the commencement of the action has expired, thus rendering applicable the statute authorizing the commencement of a new action within one year after the date of such failure, the plaintiff may cause the issuance and service of another summons in the same action upon the petition previously filed, or an amended petition, thereby commencing the action anew.

8. Where a debt is payable in installments the statute of limitations runs upon the whole debt from the date of the first default only when such default has the effect, by the terms of the contract or otherwise, of maturing the whole debt. If the default does not mature the whole debt, then the statute will run from the date thereof, if at all, only upon the installment as to which the default has occurred.
9. Under a provision in a trust deed or mortgage securing a debt payable in installments that upon any default the whole debt and interest may at once, at the option of the legal holder thereof, become due and payable, the option is solely for the creditor's benefit, and unless he exercises it, the statute of limitations runs on the debt only from the time of its maturity as originally fixed.
10. It was provided in the by-laws of a mutual building and loan association that if any shareholder shall neglect to pay interest or dues on his loan, or the regular monthly installment, or other fees, for six months, the association may compel payment of principal, interest, fees, or dues by proceedings on his note, and foreclosing the mortgage or other security, which shall at once become due and payable. *Held*, that whether or not the provision matures the debt absolutely without an option at the time it takes effect, it is not to be construed as doing so until after a failure for six months to make the required payments.
11. A shareholder of a mutual building and loan association, upon receiving a loan equal to the par value of his shares, executed a note or contract acknowledging the loan and providing for the monthly payment of a stated sum "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association, and this loan is thereby repaid," and made the required payments for six years, a period originally estimated in the by-laws and circulars of the association to be sufficient to mature the stock. No further payments being made, the association several years later sued to recover a sum alleged to be due upon the note. *Held*, that the plaintiff to maintain its right of recovery was bound to prove that the stock had not matured, since otherwise no default could be established.
12. The plaintiff association having alleged in its petition in such suit the value of the stock at the time of bringing suit and a willingness to credit the value upon the amount found to be due, and the answer, without objecting to

such credit, having denied that the value was only that stated in the petition, and alleged that the stock had or ought to have matured and therefore there was no indebtedness, the defendant shareholder should be allowed the value of the stock with interest in reduction of any amount found to be due upon the debt.

[Decided April 21, 1908.]

(95 Pac., 54.)

ERROR to the District Court, Carbon County; HON. DAVID H. CRAIG, Judge.

The facts are stated in the opinion.

McMicken & Blydenburgh, for plaintiff in error.

It was necessary for the plaintiff to prove the stock had not matured to maintain its suit. The failure to pay an installment, if any was due, in view of the by-laws of the association, gave a right of action upon the whole debt, and, therefore, upon the first default the statute of limitations commenced to run. (*Bank v. Peck*, 8 Kan. 663; *Hemp v. Garland*, 4 Q. B. 519; *Reeves v. Butcher*, 2 id. 509; *Mach. Works v. Reigon*, 64 Tex. 89; *Noell v. Gaines*, 68 Mo. 649; *Mfg. Co. v. Howard*, 28 Fed. 741; *Darrow v. Scullin*, 19 Kan. 59; *Meyer v. Grauber*, id. 165; *Lewis v. Lewis*, 58 id. 564; *Douthitt v. Farrell*, 60 id. 195; *Kennedy v. Gobson*, 68 id. 612.) The statute runs against building associations as in case of other corporations. (*Thomp. B. Associations*, (2d Ed.) 202.) The first summons and service that was quashed was void because improperly directed to and served by the coroner, and no action was therefore commenced by it, so that the statute authorizing a new action in one year did not become applicable. The action was barred under both the general statute and the section relating to suits against an administrator. When a summons is void and not voidable. (*Bowen v. Jones*, 13 Ired. L.; *Anthony v. Beede*, 17 Ark. 447; *Rudd v. Thompson*, 22 Ark. 363; *Vaugh v. Burn*, 9 Ark. 20; *Bertonlin v. Bourgoin*, 19 La. An. 360; *Bigboo v. Ashley*, 7 Ill. 151; *Hickey v. Fonistal*, 49 Ill. 255; *Arnold v.*

Winn, 26 Miss. 338; Nabors v. Thorson, 1 Ala. 590; Cullantry v. Hanold, 61 Ga. 111; Smith et al. v. Anrick et al., 6 Colo. 338; Sidwell v. Schumaker, 99 Ill. 426; Hocklander v. Hocklander, 73 Ill. 618; Tyman v. Hilton, 44 Cal. 630; Ward v. Ward, 59 Cal. 139; Johnson v. Turnell, (Wis.) 89 N. W. 515; Flint v. Noyes, 27 Kan. 331; Coke Litt. 168 a.; Graves v. Smart, 75 Me. 295; Galvey v. Jones, 80 Ga. 136; Gowley v. Sanders, 88 Ky. 346; Williams v. Hutchinson, 26 Fla. 513; Jonasen v. Walthers, 26 Fla. 448; Andrews v. Fitzpatrick, 16 S. E. 278; Biard v. Smith, 9 Ia. 50; Carlisle v. Weston, 21 Pick.; Granties v. Rosecrance, 27 Wis. 488; R. Co. v. Sayre, 13 N. W. 404; Gallegee v. Pino, 1 N. H. 410; Wood v. Crosby, 2 Hi. 520; Avery v. Warren, 12 Heisk. (Tenn.) 569.)

A suit instituted and voluntarily abandoned is not available in a subsequent action to save it from the statute. (Neil v. Canal Co., 4 Ind. 431; Ivans v. Schooley, 18 N. J. L. 269; Reilly v. Reilly, 64 Hun 496; Seigfried v. R. R. Co., 50 O. St. 294.) Unless there has been service within 60 days, no matter how the failure to obtain legal service occurred, even if it was by the action of the defendant in purposely avoiding service, the statute will bar the action if not in time. (Maghee v. Gainsville, 78 Ga. 790; Amy v. Watertown, (U. S.) 32 L. Ed. 953; Knowlton v. Watertown, 130 U. S. 327; Burgett v. Strickland, 32 Hun 264.) Where the service is defective, the statutes are not suspended. (Furkeks v. Case, 75 Ia. 152; 39 N. W. 238; Peck v. Ins. Co., 102 Mich. 52; Woodville v. Harrison, 3 Wis. 360; Johnson v. Turnell, 113 Wis. 468.)

The action here was not commenced. (Davis v. Ballard, 38 Neb. 830; Trust Co. v. Atherton, 67 Neb. 305; Burlington v. Cooper, 53 N. W. 1025; Hotchkiss v. Aukerman, 65 Neb. 177; Searle v. Adams, 89 Am. Dec. 298; Smith v. Day, (Ore.) 64 Pac. 812; Bacigalapo v. Court, 40 Pac. 1055.) The quashing of service left the case in the same condition as though no summons had ever issued, except that it might perhaps have been claimed to authorize a

service within sixty days as an attempted commencement of the action. (Supply Co. v. Freeze, 74 S. W. 303; Hayton v. Beason, 31 Wash. 317; Bertrand v. Knox, 39 La. An. 431; Detroit, &c. Co. v. Bagg, 44 N. W. 149; Blair v. Cary, 9 Wis. 543; Wolfenden v. Barry, 65 Ia. 653; Neick v. Leigh, 59 Hun 616; Fulbright v. Tritt, 19 N. C. 491; Hanna v. Ingram, 53 N. C. 55; Wilton v. Detroit, 100 N. W. 1020.)

The summons of Dec. 7, 1901, was so materially different as to its endorsement, that although styled an "alias" it could not relate back to the time of the original to stop the running of the statute. (Elman v. R. R. Co., (Neb.) 105 N. W. 987; R. R. Co. v. Nichols, 8 Colo. 188; Smith v. Aurnich, 6 id. 388; Watson v. Cartner, 1 Neb. 131.) That summons was the actual commencement of the action, and at the date thereof the statutes had run.

Jabez Norman, for defendant in error.

Upon the facts five years had not elapsed from the date of the first default, which was on the last payment due the last Saturday in July, 1896. If that was not the case, the statute would not apply to this note, as there was no definite time for its maturity; the payments thereon were to continue until the stock had matured; and to mature this stock sufficient payments and profits must be made to make each share worth one hundred dollars, and the payments and profits did not amount to that sum.

The option provision of the trust deed takes the case out of the statute, for the entire debt was to become due only at the declared option of the holder. (Lowenstein v. Phelan, 17 Neb. 429; Leavitt v. Reynolds, 79 Ia. 348; Watts v. Creighton, 85 Ia. 154; Mfg. Co. v. Howard, 28 Fed. 741; Bank v. Neb. &c. Co, 17 Fed. 763; Belloc v. Davis, 38 Cal. 242.) The suit was commenced with the filing of the original petition and issuance of the summons. (Ry. Co. v. Shelton, 57 Ark. 459; Cox v. Strickland, 120 Ga. 109; Titus v. Poole, 40 N. E. 228 (N. Y.) The section authorizing a new action in one year after a failure otherwise than

on the merits became applicable upon the quashing of service. (Conolly v. Hyams, 68 N. E. 662; Meiss v. McCoy, 17 O. St. 225; Ry. Co. v. Bemis, 64 O. St. 26.) The contract of the shareholder was not limited to 72 monthly payments. (Asso'n. v. Lyttle, 16 Colo. App. 423; Asso'n. v. Jungquist, 111 Fed. 645; Kinney v. Asso'n., 113 Fed. 364.)

POTTER, CHIEF JUSTICE.

The defendant in error, who was the plaintiff below, is a Colorado corporation and belongs to that class of private corporations commonly known as building associations. Its original corporate name was The Columbia Building and Loan Association. In 1899 the name was changed to The Columbia Savings and Loan Association. This suit was brought by the association to recover an amount alleged to be due upon the note or contract of a borrowing shareholder.

Robert O'Malia, then a resident of the City of Rawlins, in this State, became a member of said association June 4, 1890, and received a certificate of that date entitling him to ten shares of the capital stock, subject to the conditions, rules, regulations and by-laws of the association. The by-laws required of each shareholder a monthly payment on the last Saturday of each month of seventy cents on each share, where no loan had been obtained on the stock, but in the event of such loan the payments were regulated by another provision presently to be referred to. It was also stated in the by-laws that each shareholder should be entitled to receive for each share named in his certificate one hundred dollars when the monthly payments and the profits apportioned thereto should equal that sum. Also that a shareholder was entitled to a loan from the association of an amount equal to the value of his shares at maturity, upon making a proper application therefor, and giving the required security. While holding said ten shares, and having regularly made the monthly payments thereon, O'Malia applied for, and, on May 26, 1893, received, a loan of one

thousand dollars, which sum equaled the amount to which he would be entitled, in the absence of a loan, upon the maturity of his shares. With his wife he executed a note or contract for the repayment of the loan and a trust deed covering real estate in Carbon County, this state, to secure it, and as collateral security he assigned to the association his shares of stock. Omitting the signatures the note or contract reads as follows:

"No. 500.

\$1,000.

"Rawlins, Wyoming, May 26, 1893.

"In consideration of One Thousand (\$1,000) Dollars loaned to me by the Columbia Building and Loan Association, we or either of us hereby promise to pay said Association at its office in Denver, Colorado, Sixteen and 25-100 Dollars per month, payable on the last Saturday of each and every month until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association and this loan is thereby repaid. The shares of stock in the Columbia Building and Loan Association held by the maker of this note as shown by Certificate of Stock No. 1753 are hereby transferred and pledged to the said association as collateral security for the performance of the conditions of this obligation and of the trust deed securing same."

The trust deed provided that in case of default in any of the payments of principal or interest, according to the tenor and effect of "said promissory note" the whole of said principal sum secured and the interest thereon to the time of sale, may at once, "at the option of the legal holder thereof, become due and payable," and the premises sold as if the indebtedness had matured. Payments by borrowing shareholders were to be governed by the following provision of the by-laws:

"Shareholders having obtained loans shall, on or before the last Saturday of each and every month until the stock borrowed upon shall have matured and the loan is thereby repaid make or cause to be made payments as follows: One

seventy-second of the sum borrowed (less the membership fee), also interest at the rate of 3 per cent per annum upon the original amount of the loan."

During the period intervening between the date of his membership and the time when he received the loan, O'Malia regularly paid the required monthly payment of seven dollars dues on his stock, and, after receiving the loan, he regularly paid the monthly installment required by the note or contract until and including the month of May, 1896, making in the aggregate seventy-two monthly payments. There is some dispute as to whether his last payment was for the month of May or June, 1896, but we think it reasonably clear from the evidence that it was the payment due the last Saturday in May. It was entered in his pass book as paid May 30, though it was not credited on the association's books until some time in June. No further payments were made. O'Malia died September 2, 1900, and shortly thereafter James H. Clause was appointed administrator of his estate. The association presented to the administrator its claim here sued upon, and the same was rejected April 13, 1901. The trust deed given to secure the loan aforesaid was made to Clyde J. Eastman, as trustee, and provided that in case of the latter's death, resignation, removal or absence, or failure or inability to act, the sheriff of Carbon County should become his successor in trust.

On July 2, 1901, the association as plaintiff filed a petition for the commencement of a cause in the District Court of Carbon County, naming James H. Clause, as administrator of the O'Malia estate, and Creed McDaniel, the sheriff of Carbon County, as defendants. The facts deemed necessary to a recovery upon the claim of the association were set out, and it was also alleged that the trustee named in the trust deed had resigned, and that the sheriff therein appointed as his successor in trust had declined to accept the trust. The prayer of the petition was for judgment against the administrator for the amount alleged to be due, viz: \$680.70, with legal interest from May 27, 1901, and

for a sale of the property covered by the trust deed. On the same date (July 2, 1901) a summons was issued on the petition against the defendants therein named by the clerk of the court, under the seal thereof, directed to the coroner of the county. The coroner's return showed service upon Clause, the administrator, July 3, 1901. The latter, appearing specially for that purpose, filed a motion to quash the service and summons on the ground that though the sheriff was named as a defendant, it appeared from the allegations of the petition that he was neither a proper party nor interested in the action, and that the process had been improperly directed to and served by the coroner. Upon that motion the district court, by an order entered November 8, 1901, quashed the service, and continued the cause for service. An alias summons was issued on the date last mentioned directed to the sheriff naming the administrator as the only party to be served. That summons appears to have been duly served upon the defendant administrator on the day it was issued. On December 7, 1901, the answer day under the summons of November 8, an amended petition was filed, and a summons issued thereon. The amended petition omitted the sheriff as a party and the prayer for a sale of the property, and demanded judgment for the allowance of the plaintiff's claim to be paid by the administrator out of the proceeds of the estate. On behalf of the administrator a demurrer was filed to that petition, which does not appear to have been acted on.

A second amended petition was filed June 26, 1902, and a summons was issued thereon June 27, 1902. The summons was duly served, and the defendant administrator filed a demurrer, which was sustained, and judgment was rendered thereon against the association. That judgment was reversed by this court on error, and the cause remanded with directions to overrule the demurrer, and for further proceedings. (13 Wyo. 166.) Upon the return of the cause to the district court, an answer was filed to the second amended petition, and the plaintiff filed a reply.

Upon the issues thus joined a trial was had to the court without a jury, resulting in a judgment for the plaintiff association for the sum of \$2,053.10, made up as follows: Principal, \$1,000. Interest to the date of judgment, November 27, 1905, \$1,053.10. The judgment ordered this amount to be paid by the administrator in due course of administration. A motion for new trial was filed and overruled, and the administrator brings the case here on error.

The original and each amended petition alleged that the shares of stock held by the decedent had not matured, and that their value June 27, 1901, a few days prior to filing the first petition, was \$887.85. Each petition alleged a total indebtedness due May 27, 1901, of \$1,568.55, consisting of \$1,000 principal, \$553.15 interest from June 3, 1896, to May 27, 1901, and \$15.40 insurance charges paid by the association with interest. The original, as well as the first amended, petition credited the alleged value of the stock, and asked judgment for the balance, \$680.70, with interest thereon from May 27, 1901. The second amended petition alleged a readiness to credit the stock value, but, without deducting it, claimed judgment for the total indebtedness aforesaid, with interest from the date mentioned. The insurance charges were not allowed, and need not therefore be considered. It appears that the interest included in the alleged indebtedness was computed at the rate of \$9.25 per month, and that the interest embraced in the judgment was computed at the same monthly rate to the date of judgment. This was upon the theory that the agreed monthly installment of \$16.25 included the monthly stock dues of seven dollars, leaving the balance as interest. The evidence shows that the installments paid were each so credited upon the books of the association, \$7 to dues and \$9.25 to interest, and the first two payments made by the decedent under the loan contract were entered in his pass book in two separate items of \$9.25 and \$7, and in entering therein the three succeeding payments the figures \$9.25 were entered in the column headed "Interest and dues" and \$16.25 in the column

headed "Totals." There was no showing upon the trial by either party as to whether or not the stock borrowed upon had matured, or what its value was at the time of trial or at any other time.

1. The defendant by his answer alleged and it is here contended that upon the by-laws of the association, and the representations of its agents and printed circulars, the obligation of the decedent as a shareholder was to pay seventy cents monthly on each share for a period of seventy-two months, and that the contract for the repayment of the loan obligated him only to make the agreed monthly payments the remainder of the period of seventy-two months, and thereby cancel the indebtedness. This position cannot be sustained.

It is true that a printed circular or prospectus distributed by the association explaining its methods and purposes stated that "shares are estimated to mature in six years, and the member may then withdraw such shares and receive \$100 therefor." But that was immediately preceded by the statement: "Whenever the amount in the loan fund to the credit of any share (from monthly payments and profits) is equal to \$100 such share shall be fully paid in and be considered to have fully matured and no more monthly payments shall be required." And it was followed by a statement that the six year estimate as to maturity of stock is a conservative one based upon the experience and calculations of the larger English associations of a similar character. It is also true that the by-laws contained a like estimate of the period required to mature the shares, and stated that all loans and calculations are made upon that estimate; and the illustrations furnished by the association as to the cost to shareholders, both borrowing and non-borrowing, were based upon seventy-two monthly payments. The by-laws however plainly provided that each shareholder would be entitled to receive \$100 for each share *when the monthly payments and profits apportioned thereto should equal that sum.* There is testimony also to the effect that at

a meeting of prospective shareholders at Rawlins, where the decedent resided, an agent of the association stated that monthly payments for seventy-two months would mature the stock. The construction contended for is claimed also to be the effect of that provision of the by-laws regulating the payments by borrowing shareholders, which fixes the monthly installment at one-seventy-second of the amount of the loan (less the membership fee) with three per cent interest per annum added. The printed circular and the by-laws stated that the association was purely mutual and co-operative, and that each member was interested in all the assets in proportion to the stock held by him.

It is apparent that the controlling provision as to the maturity of the stock, both in the circular and by-laws, is that which states that the stock will mature whenever the amount to its credit shall equal its par value. Upon that basis it would be manifestly impossible to arbitrarily determine in advance the date of maturity. Though the period required to mature the stock might be estimated, it could not be definitely fixed without ignoring the essential features of the association, and the plan adopted for maturing its stock. Six years was not stated as an arbitrary or fixed period for the stock to run, or for limiting payments, but it was expressly stated to be an estimate. It is clear that the impossibility of stating a definite time otherwise than as an estimate or opinion was recognized by the officers of the association, since they did nothing more in that respect than to state an estimated period. Such an estimate, plainly stated to be such, is not to be distorted into a contract or promise to mature the shares within the estimated period.

Where a mutual building and loan association provides for maturing its stock by the equal application to all of it, or all of a series, of the monthly dues and profits, as in the case of the association here, the argument that the association is bound by an estimate as to time of maturity, so as to limit the period for payment of dues, has not usually, if ever, been regarded with favor by the courts. That the cir-

culars and by-laws of the association here did not require or provide for the maturing of the stock in the estimated period has been uniformly held where they have been considered. (Columbia, &c. Asso'n. v. Jungquist, 111 Fed. 645; Kinney v. Columbia, &c. Asso'n., 113 Fed. 359; Columbia, &c. Asso'n. v. Lyttle, 16 Colo. App. 423.) Indeed it was held in Colorado, where the association is incorporated, that it had no power to contract that stock would mature at a fixed time. (Columbia, &c. Asso'n. v. Lyttle, *supra*.) In that case it was said with reference to the question here presented: "From this circular it appears that the shareholders of appellant united in a business venture for their mutual benefit, all shareholders to profit, or lose, in proportion to their respective shares of stock, their respective interests at any time in the association being in proportion to their stock; the value of their stock depending upon the financial success of the corporation; the further value of the stock being uncertain because dependent upon unknown factors that might enter into the future operations of the corporation. This circular stated facts from which it appeared that no one could state when the stock would mature; an effort to do so could not be other than an estimate."

The rule laid down in the by-laws for determining the monthly payments required of borrowing members seems to be unnecessarily complicated. It is difficult to understand why the stated method was employed except upon the theory that it was not desired to designate as interest the amount to be paid for the use of the money advanced. The section is not, however, open to the construction that it provides for liquidating the indebtedness with seventy-two monthly payments, nor that it provides for interest upon the loan merely at the rate of three per cent per annum. The section itself states that the monthly payments thereby provided for shall be continued until the stock borrowed upon shall have matured, and it must moreover be construed with the other provisions, particularly that one which requires shareholders to pay each month seventy cents on each share, unless a loan

has been obtained, and the one providing for maturing the stock by apportioning thereto the monthly payments and profits. However confusing in the abstract the provision for the monthly payments of borrowing shareholders may be, it does not seem possible that a shareholder could understand that his liability for stock dues would cease upon receiving a loan, and that thereafter he would be engaged in merely repaying the principal of the loan in monthly installments, with three per cent interest. There is clearly no foundation for such a belief upon any reasonable or proper construction of the by-laws, or the contract here in suit. The shareholder continues such after as well as before receiving a loan, and thereafter he sustains the dual relation to the association of shareholder and borrower, with the rights and obligations of each. The monthly payment required of the borrowing shareholder necessarily includes the monthly stock dues, for the shares remain in existence, and are to be matured by the application of monthly payments and profits, the same as shares not borrowed upon, and upon their maturity the loan is to be cancelled. The balance of the required monthly payment in excess of the dues can only represent the amount paid for the use of the money advanced prior to the maturity of the stock, and therefore constitutes the interest to be paid. In this case such interest amounted to \$9.25 per month. It would seem that this must have been understood by the shareholder in this case, since the earlier payments under the loan contract were entered in his pass book in separate items of \$7 and \$9.25; the former sum being the amount that he had previously paid monthly as dues upon his shares. We perceive no ground, therefore, for holding that the contract entered into was different from that expressed upon its face, viz: to pay the required monthly installment "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association."

2. The defendant pleaded in separate defenses both the general statute of limitations as to an action upon a contract

in writing, and the special statute as to an action upon a claim against the estate of a decedent rejected by the executor or administrator. An action upon a contract or promise in writing is limited generally to five years after the cause of action has accrued. (Rev. Stat. 1899, Secs. 3453, 3454.) Suit upon a claim against the estate of a deceased person, which has been rejected by the executor or administrator, is required to be brought within three months after the date of its rejection, if then due, or within two months after it becomes due. (Id. Sec. 4753.) It is here contended that the evidence shows the action to have been barred under each statute, and that the judgment should be reversed on that ground.

The theory of the contention as to the general statute is, first, that the cause of action accrued upon the occurring of the first default, the last Saturday of June, 1896, and second, that if, as the plaintiff claimed, the first default occurred in the payment due the last Saturday of July, 1896, then the action was not commenced within five years thereafter for the reason that the service of the summons issued upon the petition filed July 2, 1901, having been quashed, because improperly directed to and served by the coroner instead of the sheriff, the summons and service thereof was not sufficient for the commencement of the action, within the meaning of the statute as applied to the limitation of actions. Upon the ground that the summons aforesaid was void and its service quashed, it is contended that the action cannot be deemed to have been commenced with its issuance, and therefore, that it was not commenced within three months after the rejection of the claim by the administrator, which occurred April 13, 1901; and that under the special statute the suit was barred before a valid summons was issued. With reference to the point made as to the summons and the quashing of the service thereof, the defendant in error relies to save the bar of the statute upon the provisions of Section 3465, Revised Statutes of 1899, which reads as follows:

"If in an action commenced in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such reversal or failure expired, the plaintiff, or if he die and the cause of action survive, his representatives may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant."

The question raised upon the defective service will be first considered. The first summons was ordered quashed November 8, 1901, and an alias issued on that date and duly served. Another summons was issued upon the amended petition December 7, 1901, and duly served; and summons was again issued June 27, 1902, upon the second amended petition, and it was duly served. Each new summons was issued within the year after the date of quashing the first. The question therefore is in this connection whether the filing of the petition and issuance of the summons of July 2, 1901, which was afterwards quashed, operated to commence the action, so as to render applicable the statutory provision above quoted, assuming that the general statute had not barred the action at the date last aforesaid.

Within the meaning of the limitation statutes it is declared that "an action shall be deemed commenced * * * * as to each defendant, at the date of the summons which is served upon him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; and when service by publication is proper, the action shall be deemed commenced at the date of the first publication, if the publication be regularly made." (R. S. 1899. Sec. 3461.) And that "an attempt to commence an action shall be deemed equivalent to the commencement thereof * * * * when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days." (Id. Sec. 3462). A civil action

is commenced by filing in the office of the clerk of the proper court, a petition, and causing a summons to be issued thereon. (Id. Sec. 3507). The summons is required generally to be directed to and served by the sheriff. (Id. Secs. 3509, 3513). When, however, the sheriff is a party to the case, the duty of serving and executing process devolves upon the coroner. (Id. Sec. 1172). Though the sheriff was named in the petition as a party defendant, the court, in quashing service upon the motion therefor, must have decided that he was not a party within the meaning of the statute authorizing service of process by the coroner, and that the service by the coroner was improper. The correctness of that decision must be here assumed. Was there then, within the meaning of section 3465, a failure by the plaintiff otherwise than upon the merits, in an action commenced in due time, so as to authorize bringing a new action within one year after the date of such failure? In our opinion this question must be answered in the affirmative, assuming as to this point that the general statute had not run at the time the petition was filed and the summons issued, and that the time limited for the action expired between its commencement, July 2, 1901, and the quashing of service.

The question is not affected, in our opinion, by section 3462, making an attempt to commence an action followed by service within sixty days equivalent to the commencement thereof, for here service was obtained upon the summons issued, and if the action was not commenced by the issuance and service of that summons, Section 3465 would not apply, and there would be no extension of the statutory period. But if the action was commenced, then section 3465 applies if there was a failure by the plaintiff otherwise than upon the merits. The court had unquestioned jurisdiction of the subject matter of the action, so that if the service of the summons by the coroner conferred jurisdiction over the person of the defendant, the action must be held to have been commenced. The mere fact that the service was quashed

does not determine the question, for it is not every irregularity or imperfection in a summons or the service thereof which will deprive the court of jurisdiction, though it may justify or require the setting aside of service upon motion, or the reversal of a judgment upon a proper application. To have the effect of failing to give jurisdiction, the summons or service must be so radically defective that it would authorize a collateral impeachment of a judgment rendered thereon—that is to say, it must be void and not merely voidable. (23 Cyc. 1075, 1076.)

The decisions are not harmonious as to the particular defects in a summons which will render it void and permit on that ground a collateral attack upon the judgment. Various defects have been considered in that respect, and as to most of them a conflict of authority exists. There is some conflict, but not much where the process has been misdirected. (Alderson on Judicial Wr. & Proc. ch. 6). Where there has been actual personal service, and therefore notice of the action, the weight of authority and the better reasoning favors the theory that a mistake in the direction or address renders the process voidable, but not void. In the work above cited Mr. Alderson says, in summing up the matter: "The progressive and equitable idea is, that in the administration of justice, substance is to be held in higher regard than form, and technical defects should never be permitted to work injustice or deny substantial right. Process that is in every other particular valid, should not, for any omission of or defect in the direction, be considered more than voidable." (Id. Sec. 25.)

A practice had grown up in Massachusetts of having the writ directed to and served by a coroner whenever the sheriff was a member of a corporation, which was either plaintiff or defendant. Finally that practice was held to be and to have been improper, but it was also held that the defect would not invalidate the judgments in cases wherein the incorrect practice had been followed. The court said: "It is not too late to go back to the true construction, and

for the practice, if wrong, to be corrected. No decided cases can be disturbed, for it is only at the threshold that a wrong service by a sheriff or a coroner can be taken advantage of against the action." (Merchant's Bank v. Cook, 4 Pick. 405.) In Shaw v. Baldwin, 33 Vt. 447, it was held that though the service of process upon a sheriff by his deputy was irregular, if advantage of the defect was not taken by proper objection, the service was so far sufficient that a judgment could not be impeached if recovered on the process thus served. See also Simcoke v. Frederick, 1 Ind. 54; Burke v. Interstate &c. Ass'n. (Mont.) 64 Pac. 879. It is to be remembered that when the sheriff is a party to the case the coroner is required to serve process and perform all other duties of the sheriff. In this case as originally brought the sheriff was named as a party, defendant. Had no question been raised as to parties his name might have been retained as a party to the case. To determine the insufficiency of the summons and service it was necessary that the court look into the petition and the allegations thereof to ascertain and adjudge whether or not he had been properly named as a defendant. Had the plaintiff in error here, who had been joined with the sheriff as a defendant, not objected, we do not think that upon collateral attack, the judgment could have been held void on the ground of defective process because the sheriff had been improperly made a party. The coroner being an officer authorized under certain circumstances to serve process, we are satisfied that service by him, though improper, and furnishing a reason for quashing service upon objection, or for reversal of the judgment, in case of the erroneous overruling of such an objection, does not have the effect of rendering the judgment absolutely void, or throwing it open to collateral impeachment, where, at least, the sheriff appears to have been named as a party to the cause.

The summons and service not having been void, but voidable only, the action was commenced within the meaning of section 3465. Upon the quashing of the service there

was a failure otherwise than upon the merits, thus rendering Section 3465 applicable. (*Meisse v. McCoy's Admr.* 17 O. St. 225; *Ketterman v. Railroad Co.*, 48 W. Va. 606; *Isaacs et al v. Price*, 2 Dill. 347; *Eaton v. Chapin*, 7 R. I. 408; *Bank of Topeka v. Clark*, (Kan.) 77 Pac. 92; *Harris v. Davenport*, 132 N. C. 697.) The case cited in 4 Dillon construed a similar statute of Kansas. There had been a defective service and a judgment had been set aside on that ground. Judge Dillon held that the judgment upon the first service was not void, but regular upon the record, that there had not been a failure on the merits, but the plaintiffs were within the equitable and just provision of the legislation made for such cases, referring to a section of the statute identical almost with our section 3465. In the West Virginia case above cited, the failure because of defective summons was said to be within the very reason of a similar statute extending the time after a dismissal for any cause which could not be plead in bar of the action. Statutes of this character are usually construed very liberally. Indeed, there are a number of cases holding that a dismissal for want of jurisdiction is such a failure otherwise than on the merits as is contemplated by the statute extending the period of limitation for a new action.

If, notwithstanding that the time limited had expired at the time of the failure through the quashing of service, a new action might have been brought within one year thereafter, there seems no good reason for doubting the right of the plaintiff to cause the issuance and service of another summons in the same action, upon the petition previously filed or an amended petition, thereby commencing the action anew. It is equivalent to commencing a new action within the meaning of the statute authorizing it. Such action is indeed then to be deemed commenced under section 3461 at the date of the summons served upon the defendant, but the limitation period will have been extended one year from the date of the previous failure by the operation of section 3465.

This brings us to a consideration of the question whether under the general statute of five years, the commencement of the action July 2, 1901, was in due time. The contention that it was not is based on the theory that the cause of action accrued upon the first default—the last Saturday of June, 1896. Conceding that to have been the date of the first default the contention cannot be sustained. Where a debt is payable in installments, the statute of limitations runs upon the whole debt from the date of the first default only when such default has the effect, by the terms of the contract or otherwise, of maturing the whole debt. If the default does not mature the whole debt, then the statute will run from the date thereof if at all only upon the installment as to which default has occurred. If this contract is to be construed as one providing for the payment of the debt by monthly installments, then the statute would have run merely upon the installment due in June 1896, at the time the action was commenced, unless that default matured the entire debt. As the interest part only of the agreed installment is sought to be recovered, there may be some question whether it would come under the rule as to debts payable in installments. But we think it clear that the default in the June, 1896, installment did not mature the whole debt at the date of such default, or at a date five years prior to the commencement of the action.

The provision of the trust deed as to maturing the debt upon default in making the agreed monthly payments is, that in case of such default "the whole of said principal sum hereby secured and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof (the note) become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured." It does not appear that the option thus permitted of making the whole debt due and payable was exercised until the bringing of the suit. The contract did not declare that any default would at all events render the principal debt due at once, but only that

it might become due at the creditor's option. There is a conflict of authority upon the question whether, to set the statute of limitations in motion, a debtor can take advantage of a provision in the contract providing, without leaving it to the option of either party, that upon a failure to pay an installment the entire principal and interest shall become due and payable. (25 Cyc. 1103, 1104.) And there may be a few cases holding, where the provision is that the creditor may at his option hasten the maturity of the debt upon a default in the payment of interest or an installment, that the debtor may require the period of limitations to be computed from the default which would authorize the creditor to act. The better doctrine, however, is said to be, and we think correctly, that the option is solely for the creditor's benefit, and unless he exercises it the statute runs on the debt only from the time of its maturity as originally fixed. (19 Am. & Eng. Ency. L. (2nd Ed.) 205; *Watts v. Creighton*, 85 Ia. 154; *Moline Plow Co. v. Webb*, 141 U. S. 616.)

There is another provision entering into the contract here which seems to contemplate that a default in a single installment shall not immediately mature the debt. It is found in the by-laws of the association, and declares that "if any shareholder or other person shall neglect to pay the interest, or dues on his loan, or the regular monthly installments, or other fees, for six months, the association may compel payment of principal, interest, fees or dues, by proceedings on his note and foreclosing the mortgage or other security, which shall at once become due and payable." Whether or not this provision matures the debt absolutely without an option at the time it takes effect, it is not to be construed as doing so until after a failure for six months to make the required payments. Our attention has not been called to any other stipulation or provision affecting this question. The note or contract states no definite time for the payment of the principal of the loan, except that it requires the monthly payments to be made until the stock

shall have matured, whereupon the debt will become paid. If the whole debt became due and payable by virtue of the above mentioned provision of the by-laws upon default for six months in making the agreed payments, that time did not expire until the last Saturday of December, 1896, and within five years thereafter, viz: December 7, 1901, the amended petition was filed, and a summons issued thereon of the same date, which was served upon the defendant. We perceive no reasonable ground, therefore, for holding that the statute had run when the action was commenced.

3. Notwithstanding that there was no showing by the plaintiff, or indeed by either party, as to the value of the shares borrowed upon, or whether or not they had at any time matured, the plaintiff was permitted to recover the principal amount loaned and the agreed monthly interest thereon to the date of judgment. This we think was erroneous.

The note or contract sued upon stipulates that, in consideration of the loan, the stated monthly installments shall be paid "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association and this loan is thereby repaid." The agreement is not to pay the amount of the principal within a certain period, subject to a proviso or condition that the debt shall be deemed satisfied or cancelled whenever the stock shall mature, as in most of the reported building association cases which have come to our notice. The note here sued on had not become due upon its face because of the expiration of a definite time for which it had been given, but it became due and enforceable, if at all, because the monthly payments had not been continued as agreed until the maturity of the stock. The petition alleges that the value of the stock in June, 1901 had reached the sum of \$887.85, only \$112.15 less than its value at maturity. The cause was not tried until more than four years later. Continuous payments had been made previous to default for six years, a period originally estimated by the association to be sufficient

to mature the stock. There is no room, therefore, for the presumption in support of plaintiff's case that the debt had not been paid by the maturing of the stock in June, 1896, at the time of the alleged first default, or that when suit was brought or trial had, the stock had not matured so as to pay the principal and stop interest, at some intervening period. Nor, upon the circumstances, considering the length of the period between the making of the loan and the alleged default, and especially the time of bringing suit and the date of trial, can it be said that the production of the note or contract presented a *prima facie* case. It is true that an officer of the association, testifying as a witness, was allowed to state that there was due upon the note the principal sum of \$1,000, and \$1,053.10 interest, computed at \$9.25 per month from June 3, 1896, to December 3, 1905. The amount of interest was a mere matter of computation, and the amount of the principal is expressed in the contract. Whether anything was or was not due or had become due depended upon the fact as to the maturity of the stock.

Had the note provided for a payment of the sum borrowed within a stated period, which had expired, that it had become due would then have been evident, and generally it would then have devolved upon the defendant to show payment or other facts relied upon to defeat a recovery. But upon the terms of the contract here, the case presents an exception to the general rule, and the plaintiff to maintain its right to recover was bound to prove a negative upon which its claim depended, viz: that the stock had not matured, for there could have been no default unless the negative was true, and hence no breach of the contract. Certainly the association would have no right to recover the principal if at any time it became paid by the maturing of the stock, nor interest after such payment occurred.

A similar question has been considered in two cases, though under different contracts and circumstances, but they illustrate the proposition. In *Tyrrell L. & B. Asso'n. v. Haley*, 139 Pa. St. 476, a bond had been given to a

building and loan association by a borrowing shareholder, conditioned for the payment of a loan within nine years from date, with interest, fines, etc., and a monthly contribution on the obligor's shares. In a suit upon the bond the defendant offered to show by a witness that the stock had matured upon the making of his last payment. The offer was refused on the ground that the matter could not be determined upon the judgment of a witness, but only by the division of the profits made by the officers of the association. It will be observed that the bond in that case fixed a definite period for the repayment of the loan, and in the decision of the case it seems to have been assumed that the burden of showing the maturity of the stock as a ground for discontinuing payments was upon the defendant, though the point really decided by the appellate court was that he had a right to prove the maturity of the stock in the manner proposed, in support of his equitable defense of payment. The court said:

"If the defendant is right in his contention, he certainly ought to have an opportunity of showing it, under his equitable plea of payment. As the case stands, he has a judgment at law against him for the full amount of the mortgage, which carries with it the costs of suit, while I see no relief from the effect of this judgment, except by a proceeding in equity, which involves additional expense and trouble. It would be unjust to subject him to all this, if, in point of fact, his series has matured. It is a well settled rule that when such stock has matured, the debt is paid, and the borrower is entitled to a return of his securities. There may be circumstances which prevent or delay the maturity of the stock in a given instance. This may result from fraud or mismanagement on the part of the officers of the association, or from loss on investments. *But, when the stock has fairly matured, I am unable to see what right the association has to recover a judgment against one of its stockholders for the amount of its loan.*"

In *Concordia Sav. & Aid Asso'n. v. Read*, 93 N. Y. 474, the action was to foreclose a mortgage given to secure a

bond conditioned to pay a certain sum in monthly installments, together with fines, dues, &c., during the existence of the association. It seems that the association would cease whenever it had received money enough to redeem all its outstanding shares. It was contended that it was incumbent on the plaintiff to show that there were outstanding shares and the amount required to redeem them. The principle so contended for was not denied, but it was held that the proof was *prima facie* sufficient, for the reason that the defendant had made payments less than a year after he obtained the money, and the suit was begun within two years after the loan was made, within which period enough money to redeem the shares could not by any possibility have been received by the association.

The facts here differ materially from those in the New York case. Here the member had continued to pay throughout the entire period originally estimated to be sufficient, and though the association was not bound to mature the stock within the estimated period, it is not unreasonable to suppose that it made and published the estimate in good faith, believing it to be conservative, and expecting the stock to reach maturity within the time so stated. The plaintiff alleged in each petition that the stock had not matured. That allegation must have been regarded as material. We think it was material. It is not apparent to us how a default could be established except by showing that the stock had not matured, for it is only until maturity that the payments were agreed to be made. We are not now considering whether the value of the stock should be credited to defendant. The proposition goes to the foundation of plaintiff's case. In our opinion it was necessary for the plaintiff, not only to allege but to prove that the stock had not matured, in order to establish a default under the contract sued on, especially so as the facts are peculiarly within the knowledge of the officers of the association. Not only does the petition allege a value of the shares approaching close to maturity, but it is stated in the brief of the as-

sociation filed in this court April 22, 1907, that the value had reached \$1,258.58, a considerable sum in excess of the required value to mature the same. The same fact as to value was stated by counsel upon the argument of the case. It seems possible, if not indeed probable, from this statement, that interest may have been recovered at the monthly contract rate after maturity of the shares, and during a period when there would be no right to such interest. We are clearly of the opinion that whenever the stock reached maturity the principal was paid and interest thereafter ceased, though we assume that the unpaid interest for the period intervening between the time of default and maturity would be recoverable, if a default should be established.

As the case must be remanded for new trial, we think it proper to refer to the failure of the court to credit the value of the shares. While it is argued on behalf of the association that the application of the value of the stock in reduction of the indebtedness was not required in this action upon the note, it is, however, conceded that no court would enforce payment of the association's claim without compelling it to account for the value of the stock. It is not suggested how that accounting would be compelled. The judgment heretofore entered requires the administrator to pay the full amount of the claim, principal and interest, and necessarily leaves the stock or its value with the association. To get away from the necessity of paying the amount of the judgment, if allowed to stand in its present form, would seem to require, unless the association should voluntarily and satisfactorily account for the stock, an action of some sort by the administrator. In this connection the remark of the court in the Pennsylvania case above cited is pertinent. It would be unjust to require the defendant to pursue another remedy, perhaps expensive and troublesome, when the whole matter is capable of settlement in the one suit.

While the stock is technically held as collateral security, and the rules governing such securities are to a great ex-

tent applicable, it is to be observed that it differs in important particulars from ordinary commercial paper or stock in other corporations held as collateral. The stock here forms the basis of the loan, and upon its value depends the termination of the liability. The dues thereon were included in the monthly payment required by the loan contract. The expectation of the parties in such cases is to mature the stock, whereupon the relation both of shareholder and debtor will cease, so far as it is represented or affected by the stock borrowed upon. Although the payment of dues and interest will not *ipso facto* operate as payment upon the debt, the effect thereof, by assisting in the increase of the value of the stock, is to hasten the time of the satisfaction of the debt, and furnish the shareholder with an increasing fund to his credit which he may, under the rules of the association and the law governing it, have applied toward the reduction of his debt when called upon to pay it. We are aware that it is held that if neither party makes or asks for such an application, the law will not do so in the first instance, except perhaps upon final decree on foreclosure. Where, however, the member has been so long in default in the payment of dues as to show no disposition to continue the relation of shareholder, there seems to be no substantial reason against crediting the value of the stock and rendering judgment for the balance, if any. Such a course will close the litigation, and we see no injustice in it. It appears especially proper in this case against an administrator, the shareholder having died long after the alleged default.

Moreover, in the case at bar, the plaintiff alleges the value of the stock at a specified time, and a willingness to credit the value upon the amount found to be due. The answer does not object to such credit. It denies that the value is only the amount stated in the petition, and alleges that the stock had matured, or ought to have matured, and that by reason of its maturity, there was no indebtedness. Upon the pleadings, therefore, there is an admitted item of credit, and, without further proof, the value of the

stock was at least as great as admitted in the petition. We think it proper under the circumstances, if not indeed necessary, to allow the defendant administrator the value of the stock with interest in reduction of any amount found due upon the debt, if a debt should be established. A credit having been admitted by the plaintiff in its petition, proof thereof on the part of defendant was not required, except to establish a credit for a greater amount.

For the insufficiency of the evidence to show that the stock borrowed upon had not matured at the time of the alleged default, and when, if ever it did mature, the judgment will be reversed, and the cause remanded for new trial.

BEARD, J., and SCOTT, J., concur.

STATE EX REL. SULLIVAN ET AL. v. SCHNITGER, SECRETARY OF STATE.

STATUTES—APPORTIONMENT ACTS—VALIDITY—ADMISSION OF PARTIES—JUDICIAL NOTICE OF ORGANIZATION OF COUNTIES—LEGISLATIVE DISTRICTS—NEW COUNTIES—JUDICIAL NOTICE OF POPULATION OF STATE—LEGISLATIVE APPORTIONMENT—RATIOS—STATUTES—REPEAL—JUDICIAL NOTICE OF MEMBERSHIP OF LEGISLATURE—HOLD-OVER SENATORS—CHARACTER, EFFECT, AND APPLICATION OF APPORTIONMENT CONTAINED IN THE CONSTITUTION—LEGISLATURE ELECTED UNDER INVALID APPORTIONMENT ACT—POWER OF COURT TO DETERMINE QUALIFICATION OF SENATORS AND REPRESENTATIVES—MANDAMUS—TO DETERMINE VALIDITY OF AN APPORTIONMENT ACT.

1. It is not within the power of parties litigant to bind the court by an admission or stipulation that a statute is invalid.
2. The constitution of the State of Wyoming, adopted and ratified at an election held in November, 1889, went into effect upon the approval of the act of admission, July 10, 1890.
3. Judicial notice will be taken of the organization of the counties of the state.
4. The constitution having declared each county a senatorial and representative district entitled to at least one senator

and one representative and apportioned among the then existing organized counties, the senators and representatives to compose the legislature until an apportionment as otherwise provided by law, a newly organized county is constituted a separate senatorial and representative district by a subsequent legislative act declaring it to be such and thereupon entitled to at least the minimum representation under any general apportionment act.

5. Under an act entitled "An act fixing the state senatorial and representative districts and determining the legislative representation thereof" and declaring that each organized county shall constitute a separate senatorial and representative district, each county so referred to becomes a separate district, and that part of the act may stand as severable from the remainder of the act apportioning the representation, though the latter may be subject to some constitutional objection.
6. Though not mentioned in the temporary apportionment contained in the constitution as separate senatorial and representative districts, the counties organized since the adoption of that instrument have become such by a declaration to that effect in the apportionment acts passed since their organization, and are entitled to have their representation taken into consideration and fixed in any apportionment of senators and representatives, in view especially of the constitutional provision that each county shall constitute a district.
7. The population of the state as determined by authority of law is a matter of legislative as well as judicial knowledge.
8. Where an apportionment act fails to express the ratios upon which senators and representatives were apportioned between the counties as separate districts, the ratios are the number of inhabitants of the state divided by the number of senators and representatives respectively.
9. The provisions of the apportionment act of 1901 fixing ratios for the apportionment of senators and representatives upon the basis of the United States census of 1900 were repealed by the apportionment act of 1907, if the latter act is valid, since the apportionment made by the latter act is based upon a later census enumeration made under state authority in 1905, and is inconsistent with the ratio provisions of the act of 1901.
10. Applying the natural rule as to ratio in the absence of any expressed in the apportionment act of 1907, each organized

county, as a separate senatorial and representative district, was, inclusive of the minimum representation fixed by the constitution, entitled to one senator for each unit of 3771 inhabitants, and one representative for each unit of 1818 inhabitants upon the basis of 24 senators and 56 representatives provided for by the act, and these ratios should have been so applied that each of such districts, though having a population less than such units, should have the minimum representation.

11. The court takes judicial notice of the membership of the legislature and the terms of the senators as the senate is presently constituted, and the journal of either branch of the legislature in so far as it is germane to and bears upon the question involved.
12. The provisions of the constitution relating to legislative apportionment in connection with the provision that senators shall be elected for four years, that those first elected shall be divided into two classes, one to serve for two and the other for four years, contemplate and intend that one-half of the senators shall hold over, and that the hold-over senators shall be taken into consideration in any subsequent apportionment act.
13. The apportionment contained in the constitution was based upon the number of votes cast at the election last preceding the framing of that instrument, and was intended to be temporary in its application, and applicable to then existing conditions. It does not partake of that fixed and enduring character of other constitutional provisions which never yield to legislative enactment, and cannot at any time be applied so as to disturb conditions which are the legitimate outgrowth of other provisions permanent in their nature.
14. A valid legislative enactment superseding the temporary apportionment of senators and representatives found in the constitution is not necessary to render the latter inapplicable, but it may become so through the operation of other constitutional provisions under which the legislative department has been organized and established, and out of which conditions have arisen rendering its present application impossible without violating express and unyielding constitutional provisions.
15. The invalidity, because unfair or inequitable and violative of the constitutional rule of apportionment, of an apportionment

(16)

tionment act does not render the legislature elected thereunder illegal, or empower the court to inquire into the qualification or right of any one to sit as a member thereof; the last and final arbiter of such question is the legislature itself, each house being the sole and exclusive judge of the election and qualification of its members, which determination is so far judicial in its nature as to make one so admitted a member, not only a member *de facto*, but *de jure* also.

16. It being contended that the last apportionment act of 1907, and the only preceding apportionment acts of 1901 and 1893 are invalid, because inequitable and violative of the constitutional rule of apportionment as between the various counties, and that the ensuing election should be ordered to be held under the apportionment found in the constitution as the only valid one, it is *held* that, since the court is without power to question the right of any member of the legislature as presently constituted to his seat therein, or of any holdover senator to his seat in the legislature next to convene, a senator who was elected for the term of four years by authority of one of the alleged invalid acts, in a newly organized county not referred to in the apportionment found in the constitution, was admitted as a member of the senate, and whose term will not expire until after the next ensuing session of the legislature, must be treated by the court as a senator *de jure* for the full term for which he was elected and qualified; and that rule equally applies to the holdover senator from the remaining part of the old county out of whose territory the new county was created, thus rendering it necessary for the court to regard as *de jure* senators two from a territory mentioned by the name of the old county as a single district and as entitled to but one senator in the apportionment section of the constitution.
17. By constitutional provisions, the legislature first consisted of 16 senators and 33 representatives apportioned between the then existing organized counties; each county is declared to constitute a senatorial and representative district entitled to at least one senator and one representative; senators are to be elected for four years, those first elected to be divided by lot into two classes, as nearly equal as may be, the first to serve for two, and the second for four years. New counties were afterwards organized, in one of which, as well as in the old county from which it was

taken, pursuant to an apportionment act, a senator had been elected and admitted as a member of the senate, whose term would not expire until after the next ensuing session. Holdover senators were also in office from other old counties which had been divided, in whose election the new counties had no voice; and under the apportionment contained in the constitution such new counties could not be represented except as part of the old counties respectively, since such apportionment was confined to the counties as then organized. It was sought by mandamus to compel an election under the apportionment contained in the constitution, disregarding the apportionment acts respectively of 1907, 1901, and 1893, on the ground of the alleged invalidity of each of said acts because violative of the constitutional provision that the apportionment should be made upon the basis of the last enumeration of inhabitants by authority of the state or United States, according to ratios to be fixed by law. Pursuant to the acts of 1893 and 1901 the membership of the legislature had been increased so that at the session of 1907, and when suit was brought, there were 13 holdover senators, thereby allowing the election of only 4 to complete the number apportioned by the constitution, and requiring that number to give the counties named in the constitution their declared representation. *Held*, that an election under the apportionment contained in the constitution would be illegal and ought not therefore to be compelled, since it would violate the constitutional provision for two classes of senators as nearly equal as may be, and the election of 4 senators would give the senate a membership of 17, leaving the house with 33 members, in violation of the constitutional requirement that the number of members of the house shall at no time be less than twice the number in the senate, and such election if held would further result in the representation of certain new counties by holdover senators, not residents thereof and who were not elected therefrom or from an entire district as established by the apportionment of the constitution, but by the electors of that part of the old counties respectively remaining after their division and composing a part only of the original district.

18. The writ of mandamus will only issue in the sound discretion of the court, which means that the question whether it ought to issue depends upon the result of a judicial examination of the facts either as alleged or proven.

19. To authorize mandamus the relators must show a clear legal right to which they are entitled, which is withheld or threatened to be withheld from them, and that it is the legal duty of the respondent to perform the act sought to be coerced, and that such performance can only be secured by means of the writ.
20. If mandamus be not the proper remedy, or would be ineffectual to secure the right claimed, then it should not issue, since it would then be of no benefit.
21. The right to the writ does not exist to coerce the performance of an illegal act.
22. It is incumbent upon relators seeking the writ of mandamus to compel the election of members of the legislature in disregard of an apportionment act on the ground that the same is invalid, to show a prior valid apportionment to fall back to, and one under which the election of a valid and constitutional legislature can be held. Failing to do so, and thereby failing to show themselves entitled to the writ, the court is not called upon nor is it necessary to decide the constitutionality of the act assailed, which then becomes a mere abstract question.

[Decided May 12, 1908.]

(95.Pac., 698.)

ORIGINAL proceeding in mandamus.

The case was instituted upon a petition filed in the name of the State on the relation of Patrick Sullivan and John T. Williams, praying for the writ of mandamus to compel an election of members of the Legislature under the apportionment contained in the constitution, in disregard of all subsequent apportionment acts, each of which acts were alleged to be invalid. Hearing was had upon a demurrer to the petition and alternative writ. The facts are stated in the opinion.

W. E. Mullen, Attorney General, for the respondent, in support of the demurrer.

The contention of relators is, that the act of 1907 is void, for the reason that the apportionment is not based upon the census of 1905, and made according to the ratio fixed by the act of 1901, that being the only ratio fixed by any legis-

lature in the state. A failure to follow this ratio and the computations made pursuant thereto in the petition, are made the sole basis of the attack upon the act of 1907. The petition also condemns the entire act of 1901, and yet inconsistently alleges the act of 1907 to be void, in failing to follow a ratio fixed by the prior statute.

The subject of legislative apportionment is referred to under two distinct heads in the constitution. Why was it covered by separate sections under distinct heads, one directing senators and representatives to be apportioned among the counties as near as may be, according to the number of their inhabitants, the other directing senators and representatives to be apportioned on a basis of the last enumeration according to ratios to be fixed by law? The only explanation is found in the debates. Committee No. 2 of the constitutional convention was a "Legislative Committee." Committee No. 6 was a committee on "Boundaries and Apportionment." Each committee made a report on legislative apportionments, and the result was the adoption of two reports under separate heads. Under settled rules of construction, the two sections must be considered together and given effect if possible. The primary principle underlying the interpretation of constitutions and statutes is that the intent is the vital part and the essence of the law. * * * The intent must be found in the instrument itself. (*Rasmussen v. Baker*, 7 Wyo. 128.) If both sections are to be given effect, legislative apportionments must be based on census enumerations according to ratios fixed by law, and senators and representatives apportioned among the counties, according to the number of their inhabitants. An apportionment law following the first section only, could not be regarded as wholly unconstitutional. For example, a law which apportions senators and representatives among the counties according to the number of their inhabitants, allowing each county at least one senator, and one representative, as directed by the first section, (Art. III, Sec. 3, Leg. Dept.) is constitutional for

it carries out the intent of the constitution, viz., to apportion and distribute representation to the counties according to their population as near as may be. The second section, (Art. III, Sec. 2, Apportionment) would seem to merely indicate a method of carrying out the provisions of the first. The petition does not allege a violation of the first section. It fails, therefore, to state a cause of action, for, if the act has, in fact, apportioned senators and representatives among the counties according to the number of their inhabitants as near as may be, giving at least one senator, and one representative to each county, the law is good. The petition as we read it does not expressly allege a contrary condition. This action is apparently based exclusively upon the second section; every complaint of inequality is predicated on a ratio requirement which is alleged to be the ratio fixed by law. Relying on this section alone, relators cannot complain on behalf of any county, because the section deals with "state census enumerations and ratios" and does not recognize counties, nor the number of inhabitants in any county.

Measured by the ratio rule recited in the petition, relators allege the act of 1907 to be unconstitutional; the premises are false and the reasoning unsound. (a) The act of 1901 which fixed that ratio rule, relators themselves allege to be unconstitutional and void. (b) The act fixing that ratio rule has been repealed by the inconsistent act of 1907. (c) The act which fixed that ratio was clearly in violation of Art. III, Sec. 3, (Legislative Department) of the constitution.

The ratio rule appearing in the act of 1901, gave one senator and one representative to each county regardless of its population. The rule was not only so declared, but the petition avers that it was followed in the act, except as to Converse, Albany and Sweetwater counties. There is no warrant in the constitution for such a rule. They are to be apportioned according to, and not regardless of, county population. While a similar rule is fixed in the

act of 1893, long acquiescence in such a rule will not make it constitutional. (*Parker v. State*, 133 Ind. 178.) The requirement that each county shall have at least one senator and one representative, does not mean that each county shall have one of each regardless of population large or small. That provision was intended for the protection of small counties, where the population is insufficient to give them representation in any other way. It was inserted as a rule of minimum representation, and not as a rule whereunder a senator and representative might be apportioned to each county before commencing to apportion according to population.

The convention understood this provision, and construed it to mean minimum representation and nothing more. This is apparent from the first apportionment appearing in the constitution itself. Where a construction has occurred contemporaneously with the adoption of the constitution by those who had an opportunity to understand the intention, a strong presumption exists that the construction rightly interprets the intention. (*Cooley Const. Limitations*, 82; *State v. McAllister*, (Tex.) 28 L. R. A. 525.) Similar provisions in the constitutions of other states, have been construed time and again, by their respective legislative bodies, but have never been given the interpretation in their apportionment acts, which we find in the acts of 1901 and 1893, whereby each county is given a complimentary senator and representative, regardless of its population.

Taking up another feature of the ratio of 1901. It is provided "That no county shall have a less representation, either in the senate or in the house representatives than is allowed to such county in the present legislature." This was a provision evidently intended to protect counties, such as the county of Converse for instance, already over-represented at the time, or any county, which according to the last census enumeration might show such a decrease in population as to otherwise require a decrease in its representation. The clear purpose of adjusting apportionments

at the legislative session next following an enumeration of inhabitants is for the purpose of increasing representation where population has increased, and decreasing representation where population has decreased.

We do not regard the allegations relating to the acts of 1901 and 1893 as having any material bearing upon the controversy here. According to our theory, each of said acts has been repealed, but if not repealed, the ratio rule provided in each of them is so clearly in violation of the constitution that we have nothing to offer in their support.

The apportionment found in the constitution was made in view of conditions existing at the time. Defendant offers no objection to it, except that owing to changed conditions, such as the organization of new counties and the increase of state population, it could not be applied without depriving a considerable number of the people of representation. The counties of Big Horn, Natrona, and Weston, have been organized since the adoption of the constitution. An election called pursuant to that apportionment would violate the provisions of Art. 3, Sec. 3, which directs that each county shall have at least one senator and one representative. Great inequalities would exist as between the other counties.

A special session of the legislature would be composed of its present membership which was elected under the apportionment made in 1901. According to relator's theory it is an unconstitutional body. If that be true it has acted heretofore as a *de facto* body. (Throop Pub. Off. 628-637; Mechem Pub. Off. 318; State v. Carroll, 38 Conn. 449; Meagher v. Story Co., 5 Nev. 244; Kirker v. Cincinnati, 48 O. St. 507.) But if the act creating it be adjudged void it is doubtful whether it could act as even a *de facto* body thereafter. There would be no certainty that it would or could enact an apportionment law satisfactory to relators, even if so convened. In seeking for a correct solution of any legal question, especially the construction of a statute, or a constitution, the result which may follow from one construction or another, is always a potent factor and is

sometimes in and of itself conclusive. Courts have a right to consider the evil which would result. (*People ex rel. Carter v. Rice*, 16 L. R. A. 852; *Rumsey v. People*, 19 N. Y. 52.)

The effect and not the intention of the legislature determines the question of the constitutionality of the act. (*Van Bokkelen v. Canady*, 73 N. C. 198.) It is our contention that the act of 1907 in fact fixed a ratio for senators and representatives; that it likewise apportioned them among the various counties of the state according to the number of their inhabitants as near as may be, and that the method observed in each instance has the support of well recognized and well settled rules of constitutional and statutory interpretation. The court cannot inquire into the motives of the legislature in making an apportionment. (*People v. Thompson*, 155 Ill. 451.)

What is a legislative apportionment ratio? The word "ratio" is a mathematical term, meaning a relation between two magnitudes of the same kind; the relation between two similar quantities in regard to how many times one makes so many times the other; relative amount; proportion. (*In re Clock*, 51 N. Y. 597.) The relation which one quantity or magnitude has to another of the same kind. It is expressed by the quotient of a division of the first by the second. (*Webster's Int. Dict.* 1191.) Hence, the word "ratio" as used in the constitution means a proportion of the magnitude represented by the entire population of the state, which proportion may be determined by dividing the magnitude by some smaller number, such as the number of senators and representatives provided for in the act, the quotient thus expressing a division or relative part of the first. It is a fixed part of the total population of the state; it is a unit of representation, employed by legislative bodies in apportioning representation among the inhabitants of a state.

Why does the constitution require the use of a ratio fixed by law? The only reasonable object in employing a

ratio unit is to secure a distribution of representation among the people of the state, and over the territorial area of the state, in a manner as nearly equitable as possible. It may be fixed on a percentage basis, or according to arbitrary numbers, or in any other manner that will accomplish an apportionment of representatives among the various counties. This can only be accomplished by the use of some ratio unit of population in making computations.

How may a ratio be "fixed by law" within the meaning of the constitution? A ratio is undoubtedly fixed by law when it is put into effect by an apportionment act, irrespective of whether it be expressed in the act by a form of words. The real question is whether or not an apportionment has been made according to some ratio, and if it has, the discovery of the ratio unit is merely a matter of mathematical computation. The constitutional convention adopted a ratio, viz.: 1,200 of the voting population for senators, and 600 of the voting population for representatives, in making its apportionment. (Constitutional Debates, pp. 82, 573-575.) It did not, however, express its ratio in words and figures, in drafting the section of the constitution containing the first legislative apportionment. It, therefore, interpreted its own rule requiring a ratio to be fixed, to mean, that it should be fixed by actual use, and that it did not require an expression of the ratio rule in any particular form. In Colorado, with a provision identical in language, it has been customary to expressly state the ratios adopted in apportionment acts. In Montana, with the same provision, the apportionment acts have not expressed the ratio, but followed a form similar to our act of 1907. This indicates that it is immaterial whether a ratio be expressed, if one is used. When a ratio is in fact used, and its use governs mathematically the making of the apportionment, as near as may be, and the use of such ratio may be ascertained, by an examination of the act itself, the act has fixed a ratio, and it is a ratio fixed by law within the meaning of the constitutional provision referred to.

Has the act of 1907 fixed and followed a ratio in its plan of apportionment? It is conceded that the act does not contain a formal expression of a ratio, but it provides for 27 senators and 56 representatives or a total legislative membership of 83. The apportionment was based upon the state census enumeration of 1905, which showed the population of the state to be 101,816. By dividing the total population of the state by 27, that being the total number of senators provided for, we have a quotient of 3,771. Using this as a ratio of senatorial representation, and allowing one senator for each time that the population of a county may be divided by it, and one additional senator for each major fraction remaining over, we find the number of senators to which each county is entitled. The only variance found in the application of this rule, is in the case of Laramie county, to which the act apportioned four senators, while under the computations thus made, that county would have a major fraction of 3,450 remaining unrepresented. This variance may be accounted for when it is remembered that three out of the total number of senators go to the counties of Johnson, Natrona and Weston, under the minority rule of representation.

By dividing the population by 56, the number of representatives provided by the act, the quotient is 1,818. Accepting this quotient as the ratio unit for representatives, and dividing the population of each county thereby, and allowing one representative for each time such county population may be so divided, and one additional representative for each major fraction of said quotient, it will be found that representatives were fairly apportioned among the various counties of the state, except in the case of Uinta county, where we find a major fraction of 1,756 for which a representative was not given. That county received a senator on a major fraction of 3,179, which was 592 short of the senatorial ratio of 3,771. This gives Uinta county a complete senatorial representation, but leaves it with a bare major representative fraction

of 1,176 unrepresented, of which there is no complaint. It is true that according to this rule Crook county was allowed a representative on a minor fraction of 195, and it is complained that under a fair approximation, this representative should have gone to Converse county, with a minor representative fraction of 532. It might also be urged that this representative might have gone to Sheridan county with a minor fraction of 875; or to Albany county with a minor fraction of 902, either of which could have presented a claim superior to that of Converse county. The legislature, however, in its discretion, gave the representative to Crook county, perhaps having in mind an equitable distribution of representatives over the territorial area of the state, or considering changes or some increase of population in the northern counties, that had occurred, or might occur, between the census of 1905, and the apportionment that will or should be made, following the census of 1910.

In the case of Weston county, a variance in the rule is found in apportioning one extra representative to that county, and this is complained of in the petition, but the complaint is based on the other plan. But it will be found that even Weston county has 876 more in population than would be sufficient to constitute a major representative fraction, under this plan. This being one of the central tier of counties in the state, the legislature might very properly be presumed to have had in mind the territorial distribution of representatives and to have exercised the discretion which it had authority to exercise, in placing extra or float representatives among minor fractional units of representation, under the plan followed.

The counties of Converse and Natrona have no just ground of complaint, for the reason that, under any conceivable percentage plan, the representation of said counties could not be increased. Their representation could not be increased at all, except under the ratio contended for by relators, which accords to each county an extra senator

and representative regardless of population. They each have minor fractions, considerably less than Sheridan, or Albany, which lacks but eight of a major representative fraction.

What is meant by the term "as near as may be," and has the act of 1907 apportioned senators and representatives among the various counties according to the number of their inhabitants, "as near as may be" within the accepted meaning of the term? It must be assumed that the convention, in making the first apportionment, followed the rules it had laid down in the constitution. Hence such apportionment interprets for us the words "as near as may be," as a contemporaneous construction by the body which used them. (*Martin v. Hunter*, 1 Wheat. 351; *Bank v. Holstead*, 10 Wheat. 63; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 290; *People v. Dean*, 14 Mich. 406; *People v. Treasurer*, 23 Mich. 499; *R. Co. v. Mills*, 85 Mich. 646; *Rasmussen v. Baker*, 7 Wyo. 117; *State v. Swan*, id. 166.) After apportioning according to the ratios employed it was found that three representatives remained to be apportioned upon fractional units; and it appears that in disposing of such representatives a mathematically correct apportionment was not made, but it is evident that the apportionment was deemed to have been made according to population "as nearly as may be." The same plan was adopted apparently as that by the legislature in passing the act of 1907.

The words "as near as may be" where used in constitutions directing the manner in which legislative apportionments shall be made, have been quite generally construed to mean words conferring discretion upon the legislature; they are not regarded as words of limitation on the power of the legislature. (*R. R. Co. v. Horst*, 93 U. S. 300; *M. Co. v. Park*, 14 Blatchf. 414; *Beardsley v. Little*, id. 105; *Reedy v. Smith*, 42 Cal. 251; *Prouty v. Stover*, 11 Kan. 261; *Op. of Justices*, 18 Me. 458.) A new apportionment cannot be compelled by mandamus or otherwise unless the

apportionment as made so far disregards the principles prescribed by the constitution as to warrant the court in saying that it is no apportionment and should be treated as a nullity. (State v. Campbell, 48 O. St. 435.) An apportionment act is not to be declared void merely because an apportionment conforming more nearly to the constitutional requirements could have been made. (People v. Thompson, 155 Ill. 450; People v. Rice, 135 N. Y. 473; People v. Campbell, 48 O. St. 435.) Any doubt will be resolved in favor of the statute. (Inv. Co. v. Carpenter, 9 Wyo. 110; State v. Cahill, 12 Wyo. 225; Barkwell v. Chatterton, 4 Wyo. 312.)

W. R. Stoll, for the relators, contra.

It is not the purpose of the petition to challenge the validity of the ratios fixed by the act of 1901, but only the apportionment made by the act, which failed to follow the ratios provided. Nor is the petition to be properly construed as alleging a violation only of the one section of the constitution relating to census enumerations and ratios, but the theory thereof, determined by its allegations, is that both sections covering the matter of apportionment were violated by the acts in question. The argument that an apportionment which first assigns the minimum representation to each county before proceeding to apportion upon the basis of the number of inhabitants is erroneous serves only to strengthen the position of relators that each act is invalid. Whether the legislature of 1893 and that of 1901 correctly interpreted the constitution or not as respects the provision for minimum representation, that provision should be viewed in the light of the importance of counties in apportionment matters. In our system of government counties have always been considered important parts of a commonwealth. For this reason it is not surprising to find especial reference to counties and to what each county, as a county, is entitled to in the matter of representation. (People v. Thomson, 155 Ill. 451; People v. B'd. 147 N.

Y. 1; *Bittle v. Stuart*, 34 Ark. 224; *Denney v. State*, 144 Ind. 503.)

While it would seem reasonable to attribute to the Legislatures of 1893 and 1901 the desire to give prominence to the counties as counties, still if it be held that the section in question in each of these enactments was not justified by the constitutional provision, these sections alone would be invalid, and the other sections which relate specifically to the ratio, would still stand unimpaired so far as this consideration is concerned.

No serious consequences would follow a return to the original apportionment of the constitution. But the argument that such would be the result is never regarded as of sufficient weight to prevent the proper department of the government from being compelled to perform its duty.

If a particular apportionment act is assailed as unconstitutional, and the court find it to be so, and if it be claimed that other preceding apportionment acts are also unconstitutional, it will go back to the next preceding apportionment act, and if this should be unconstitutional, to the next, and so on, to determine which is constitutional, and direct that the notices be given or the necessary steps be taken to make the apportionment in accordance with such act, or with the Constitution itself, unless, in the meantime, the Governor convenes a session of the Legislature to pass a valid apportionment act. (*Giddings v. Blacker*, (Mich.) 16 L. R. A. 402; *Supervisors v. Blacker*, (Mich.) id. 432; *People v. Rice*, (N. Y.) id. 836; *Parker v. State*, (Ind.) 18 L. R. A. 567; *State v. Wrightson*, (N. J.) 22 L. R. A. 548; *Denney v. State*, 144 Ind. 503; *People v. Thompson*, 155 Ill. 451; *State v. Cunningham*, (Wis.) 15 L. R. A. 561; *State v. Cunningham*, (Wis.) 17 L. R. A. 145.)

The wrong in an unconstitutional apportionment is a wrong to all citizens of the State, and any resident of any part of the State may bring the proper action. It is not necessary that the relators in this, or in any similar case, should

reside in the county or district concerning which the wrong complained of exists. (Brooks v. State, (Ind.) 70 N. E. 980.) In further support of the correctness of the foregoing propositions the following cases are cited. *In re Sherrill*, 188 N. Y. 185; *Heitman v. Gooding*, 12 Ida. 581; *Smith v. Baker*, (N. J.) 64 Atl. 1,067; *People v. Board*, 19 N. Y. S. 978; *People v. Board*, (N. Y.) 33 N. E. 827; *Ballentine v. Willey*, (Ida.) 31 Pac. 994; *People v. B'd.*, 36 N. Y. S. 40; *People v. B'd.*, 35 N. Y. S. 259; *State v. Campbell*, (Ohio) 27 N. E. 884; *In re Baird*, 27 N. Y. S. 535; *State v. VanDuyn*, 24 Neb. 586; *In re Baird*, (N. Y.) 37 N. E. 619.)

The fundamental idea in representative government is equality. This would be easy if the representation were based exclusively upon the entire population of the state, assigning one representative to a certain number in population, and disregarding any other provisions as to districts or counties; but where owing to other and restrictive provisions absolute equality is impossible, it is required that there shall be equality "as nearly as may be." Under the authorities cited the apportionment in each act clearly departed from the requirement that the representation should be as nearly equal as may be as between the counties. It would seem that there was neither an equality nor an approximation to equality when Natrona County with a population of 2,442 was given 1 representative, while Johnson County with a population of 3,027 was given 2 representatives, and Weston County with a population of 3,604, and Crook County with a population of 3,831, were each given 3 representatives; and the same would seem to be likewise true when Converse County, with an unrepresented balance of 1,918, was allowed no representative for this balance, while Carbon County, with a balance of 1,313, was allowed 1 representative for this balance, Crook County, with a balance of 1,581, was allowed 1 representative for this balance, Laramie County, with a balance of 514, was allowed 1 representative for this balance, and

Weston County, with a balance of 1,354, was allowed 1 representative for this balance. It would seem that the principles announced in the cases cited were violated in the instances just named.

The argument that as there appears to be inequality as to only two counties, it is of little moment and should not be held sufficient to disturb the validity of the act, is not sound. In many cases no greater evidences of inequality have been deemed sufficient to invalidate the act assailed.

The whole idea of representative government in this country is that in the House of Representatives we have a body that represents the popular branch of legislature, while in the Senate we have the more aristocratic representation, which are checks upon each other; that it is just as essential, to maintain equality, that each branch should be composed of its proper and proportionate numbers, and that a deficiency in one branch cannot be made up by a surplus in the other. (*State v. Cunningham*, 15 L. R. A. 561.) Nor can the Legislature take the probabilities of future population or changes therein, into consideration. The act must be based upon the proper census. (*State v. Cunningham*, 17 L. R. A. 145.) Were the ratio provisions of the act of 1901 repealed by the act of 1907? (1.) The act of 1901 was the only one that did not attempt to fix a limitation as to the time of its duration; hence, on the face of the act itself, it was for all time. (2.) The acts of 1893 and 1901 both did, on their face, establish a ratio and the act of 1907 did not, on its face, attempt to establish a ratio. (3.) If it be held that no legislature had any power to award one senator and one representative to each county, irrespective of its population, then Sec. 2 of the act of 1893, and Sec. 2 of the act of 1901, are to be ignored as unconstitutional, and this fact would not at all affect the ratio established in Secs. 3 and 4 of each of these acts. (4.) Although each of the acts of 1893 and 1901 did, on its face, establish a ratio, nevertheless, Sec. 5 of each of these acts violated its own ratio. This fact, however,

would not affect the fact that a ratio was established. (5.) The act of 1907 does not, on its face, attempt to repeal the act of 1901 or any part of it, except in Sec. 5, which fixes the numbers of senators and representatives, and if it repeals the ratio established in Secs. 2, 3 and 4 of the act of 1901, it does so only because the apportionment made in the act of 1907 did not follow the ratio established in the act of 1901, therefore, the apportionment was inconsistent with this ratio, and, hence, repealed it.

Repeals by implication are not favored and will never be indulged unless it is manifest that the legislature so intended. (26 Ency. L. (2nd Ed.) 721-723.) In cases of implied repeal the repugnancy between the later and the former act must be wholly irreconcilable, and this repugnancy must be clear and convincing, and must necessarily follow from the language used. (26 Ency. L. (2nd Ed.) 725-728.) While it is true that when the later of two acts governs the whole subject matter of the earlier one, even though it does not purport to amend it, so that it plainly appears that it was intended to be a substitute for the earlier act, the later act will operate as a repeal of the earlier one, still there must be an unmistakable intent on the part of the Legislature to make the new act a substitute for the old one and to make it contain all the law on the subject. It is presumed that a statute once enacted is enacted for all time, in the absence of an expression of a contrary intent. (26 Ency. L. 715.) By a provision in a later act that all acts and parts of acts inconsistent with the same are repealed, such act simply repeals previous enactments inconsistent with what is set forth in the repealing act. (Id. 719; *Gilbert v. Craddock*, (Kan.) 72 Pac. 869; *Dolan v. Thomas*, 12 Allen, 421; *Carter v. Burt*, 12 Allen, 424; *Simmons v. Bradley*, 27 Wis. 689; *Gov. v. Stout*, 22 Wis. 225; *State v. Grady*, 34 Conn. 118; *People v. Durick*, 20 Cal. 94; *Booth's Will*, 40 Ore. 154; *Keyes v. City*, 40 App. Div. 409; *Robinson v. Rippey*, 111 Ind. 112.) We contend that the ratios in each of the acts of

1893 and 1901 were proper, and that every apportionment by the Legislature is void for a failure to follow such ratios. The clause of the act of 1907 repealing all inconsistent parts of prior acts adds nothing to the efficacy of the statute as a repeal of the ratio sections of the previous act. (Dist. of Columbia v. Sisters &c., 15 App. Cas. 308.)

It is intended that the ratios shall be fixed by law, and not left to conjecture by a mathematical calculation based upon the number of members in proportion to population. But it is only necessary to look at the result according to the tables prepared by the Attorney General to show that even on the basis of the ratios upon which he seeks to sustain the apportionment of the act of 1907, it is unequal and violative of the express constitutional rules for an apportionment. Upon the basis of his figures, eight counties are involved in the inequalities, a large number compared with the proportionate number involved in the decided cases holding such acts to be void. There is no basis for the existence of major and minor fractions under our constitution and existing conditions. It is only a question of equality in representation on the basis of population and the matter of ratios. There is no room for even a suggestion of any discretion in the Legislature as to fractional parts of a unit or otherwise.

SCOTT, JUSTICE.

The relators have filed a petition in this court in which they pray that a writ of mandamus issue out of this court directed to the defendant commanding him as Secretary of State in notifying the boards of county commissioners of the various counties of the state what public officers are to be elected at the next general election to be held in the present year, to insert in such notice the number of senators and representatives for each county as specified in the legislative apportionment found in the constitution of the state, and to disregard the number of senators and representatives specified in the apportionment acts respectively of

1907, 1901 and 1893, unless in the meantime a session of the legislature shall be called for the purpose of enacting a valid and constitutional apportionment act. An alternative writ of mandamus has been issued and the matter has been heard upon a demurrer to the petition and alternative writ which was filed by the attorney general representing the respondent. The petition for the writ is presented in the name of the state on the relation of Patrick Sullivan and John T. Williams, who are citizens of the United States, the former being a resident, elector and citizen of the County of Natrona and the latter a resident, elector and citizen of the County of Converse; and they allege that they present the petition on behalf of themselves and all the citizens of their respective counties and of the state.

The petition assails the apportionment act approved February 19, 1907, apportioning among the different counties of the state, senators and representatives, as unconstitutional and void for the alleged reasons that the apportionment was not made upon the enumeration of the number of inhabitants of the state made in 1905, and according to ratios fixed by law as required by the constitution, and that the two preceding apportionment acts made in 1901 and 1893 are each unconstitutional for the latter reason, leaving the only valid apportionment of senators and representatives in force in the state that made by the constitution at the time of its adoption, and which was to remain in force and effect until otherwise provided by law. It is charged by the petition that the apportionment made by each act does not conform to a ratio fixed by law, and that the senators and representatives were not by said acts divided among the counties according to the number of inhabitants, and that the apportionment made by each act is unequal, and gives undue representation to certain counties, leaving others insufficiently represented.

Before proceeding with the other allegations of the petition and the statement of the claims of the respective parties, the constitutional provisions with reference to election

and apportionment of senators and representatives in so far as applicable to the question here involved will be stated. They appear in Art. III, and are respectively as follows:

Sec. 2. "Senators shall be elected for the term of four (4) years and representatives for the term of two (2) years. The senators elected at the first election shall be divided by lot into two classes as nearly equal as may be. The seats of senators of the first class shall be vacated at the expiration of the first two years, and of the second class at the expiration of four years. No person shall be a senator who has not attained the age of twenty-five years, or a representative who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state and who has not, for at least twelve months next preceding his election resided within the county or district in which he was elected."

Sec. 3. "Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate. The senate and house of representatives first elected in pursuance of this constitution shall consist of sixteen and thirty-three members respectively."

Under the sub-title of Apportionment are the following sections, viz.:

Sec. 2. "The legislature shall provide by law for an enumeration of the inhabitants of the state in the year 1895, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of

the United States, shall revise and adjust the apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law."

Sec. 4. "Until an apportionment of senators and representatives as otherwise provided by law, they shall be divided among the several counties of the state in the following manner:

Albany county, two senators and five representatives.

Carbon county, two senators and five representatives.

Converse county, one senator and three representatives.

Crook county, one senator and two representatives.

Fremont county, one senator and two representatives.

Laramie county, three senators and six representatives.

Johnson county, one senator and two representatives.

Sheridan county, one senator and two representatives.

Sweetwater county, two senators and three representatives.

Uinta county, two senators and three representatives.

The relators' complaint is directed mainly to the apportionment of the representatives. No ratio having been expressly fixed in the act of 1907 it is alleged that so much of the act of 1901 as fixed a ratio was continued in force and that the legislature was bound to follow it in the matter of the apportionment in the act of 1907. The act of 1901 provided that each organized county should be represented in the legislature by one senator and one representative regardless of the population of such county and in addition thereto should have one senator for every six thousand inhabitants and one senator for every fraction over 3,500 inhabitants, and also one representative for every 2,250 inhabitants and one representative for every fraction over 2,000 inhabitants, in addition to the minimum allowance of one senator and one representative. Upon the assumption that the ratios so fixed in the act of 1901 should be applied to the apportionment under the act of 1907 it is alleged that Weston county with a population of 3,605 was given three representatives or one to which it was

entitled and two on a major fraction; Crook county was given three representatives or two to which it was entitled and one on a minor fraction; that Uinta county was given four senators when it was only entitled to three, and that Laramie county was given ten representatives when it was only entitled to nine.

But little light is thrown upon the question here presented by the decisions of the courts of other states in cases where the constitutionality of apportionment acts have been questioned. In each case the decision rests upon the construction of constitutional provisions which obtain in the jurisdiction where the question arose and which as a whole differ materially from those in our constitution. It therefore becomes necessary in reaching a conclusion to follow the specific provisions of our constitution giving to them that construction which was plainly intended, and preserving to the relators such rights if any to which they are entitled under the allegations of their petition.

It will be observed that the counties of Big Horn, Natrona and Weston are not named in the apportionment fixed in the constitution, as separate senatorial and representative districts, although for legislative purposes they were by the various acts under which they were created attached to and remained a part of the counties from which they were respectively taken and were so included and formed a part of the districts established in that apportionment. They are however mentioned as separate districts in the different apportionment acts assailed. It therefore becomes a necessary and a material inquiry to determine their status and the effect which an election held under the apportionment fixed in the constitution would have upon these counties and the people residing within their limits.

It is admitted by the respondent in argument that the apportionment acts of 1893 and 1901 are each unconstitutional, but it is urged that the same infirmity does not exist as to the act of 1907. Such admission is one of law and this court is not bound by it. It requires a judicial deter-

mination of a court of competent jurisdiction to effect the validity of a statute on such ground. The question of the constitutionality of a statute is a judicial question and it is not within the power of parties litigant to admit or stipulate as to their invalidity. *

In the two former acts a ratio was fixed and expressed in each, but in either act it appears upon the face of the petition that the legislature disregarded such ratio in making the apportionment. It further appears that in both acts the number of senators and representatives to which each organized county was entitled under the constitution was not taken into consideration upon the ratio, but that the latter applied only to those which were allowed in addition thereto. In other words a part only of the apportionment was based upon a ratio. In each act, however, and including the act of 1907, it is provided that each organized county in the state of Wyoming shall constitute a separate senatorial and representative district for the election of senators and representatives. Natrona and Weston counties were so recognized in the act of 1893, and it was further provided in that act that Big Horn when organized should be entitled to one senator and one representative. Without, therefore, discussing further the question as to the unconstitutionality of the apportionment acts of 1893 and 1901 as a whole, we take it that if conceded as being unconstitutional in the matter of apportionment of senators and representatives, they and the act of 1907 as well, constitute a legislative recognition of the organization and a declaration of the right to representation in the legislature of the counties of Natrona and Weston, and of Big Horn when organized, as separate senatorial and representative districts, although they were not established as such in the apportionment made in the constitution. (Sec. 4, Sub-title Apportionment, *supra*.)

Section 1 of the act of 1893 is as follows: "Each organized county shall constitute a separate senatorial and representative district for the election of senators and representa-

tives." Section 1 of the act of 1901 is identical in language, as is also the first part of Section 1 of the act of 1907; and in each act the counties of Natrona and Weston are named, and in the last two the county of Big Horn is also named, as constituting such districts.

The constitution was adopted and ratified by the people at an election held for that purpose on the first Tuesday in November, A. D. 1889. (Section 7, Art. XXI of the constitution, and the act of congress admitting Wyoming as a state of the union.) On July 10, 1890, the act of admission was approved and the constitution went into effect. (Commissioners of the county of Fremont v. Perkins, 5 Wyo., 166, 170.) Between the time of the adoption of the constitution and the admission of the state the county of Weston was created and organized pursuant to Chap. 47, S. L. 1890, approved March 12, 1890, its officers having qualified on May 16, 1890. By Sec. 61, Chap. 90, S. L. 1888, Natrona county was created as an unorganized county with authority to organize upon the petition of 300 electors resident therein, in pursuance of the sections of that act, and did so become fully organized on April 12, 1890, when its officers qualified. The county of Big Horn was created and the manner of its organization prescribed by Chap. 48, S. L. 1890, which was approved March 12, 1890, but its right to so organize was postponed by Sec. 2 of the act until after February 1, 1892. Neither of these counties was represented in the first legislature which convened on November 12, 1890, as separate senatorial and representative districts, nor as such in the second state legislature which convened on January 10, 1893. At the time the constitution went into effect, viz.; July 10, 1890, Natrona and Weston were organized and Big Horn was unorganized; but for legislative purposes each continued to be part of the county or counties from which they were taken, as provided by the act or acts under which they were created, and as such they were merged in, and though not separately named constituted a part of, the senatorial and representative districts as estab-

lished by the constitution until the third state legislature which convened on January 8, 1895, when each of them was represented as separate senatorial and representative districts, the county of Big Horn having been organized in the meantime, and all having been declared to be and constituted under the apportionment act of 1893 such districts and entitled to representation. Sec. 18, Art. XXI of the constitution, being the schedule, is as follows: "Senators and members of the house of representatives shall be chosen by the qualified electors of the several senatorial and representative districts as established in this constitution, until such districts shall be changed by law, and thereafter by the qualified electors of the several districts as the same shall be established by law." It is apparent that the members of the legislature were so chosen until after the act of 1893 which had reference to the election of members for the legislature which convened on January 8, 1895.

Aside from the fact that judicial notice will be taken of the organization of these political subdivisions of the state the legislature has recognized them as such and has by the various acts of apportionment which are here assailed constituted them senatorial and representative districts. The title of each act is as follows: "An act fixing the state senatorial and representative districts and determining the legislative representation thereof." These are cognate subjects and germane to the subject of apportionment, and being followed in the act by a declaration as to what shall constitute such senatorial and representative districts clearly show the legislative intent to establish the districts thus defined. It cannot be said to be a mere re-declaration of the constitutional provision and limited to the districts existing at the time that instrument went into effect, for it was within the contemplation of the constitution that the legislature should create and establish new districts as occasion required, and further it was contemplated that each organized county should constitute such district. Such counties could be declared as such by a separate act unac-

accompanied by any general apportionment, and when so constituted they would each be a territorial unit and entitled under any general apportionment act thereafter enacted to at least the minimum representation fixed under Sec. 3, Art. III of the constitution as above quoted. We think therefore under the well established rule of construction that so much of the various apportionment acts as fixes and establishes the senatorial and representative districts is severable from the balance of the acts and might stand, whatever constitutional infirmity may exist as to the remaining portions of the acts. (Cooley, Constitutional Limitations, page 209; Sec. 297, Sutherland Stat. Constr.) The last author says at Sec. 130, *id.*: "It is germane to the subject of an act to repeal previous acts relating to it or inconsistent with it. Such repeal is ancillary to the purpose of the new legislation." See cases cited in the foot notes. The legislature was expressly authorized by Sec. 7, Art. XXI to establish new legislative districts, and in pursuance of that power the legislature did so. It necessarily follows that even though the counties of Big Horn, Natrona and Weston were not separate senatorial and representative districts at the time the constitution went into effect, and were not recognized as such in the constitution, yet they are such at the present time and are and were entitled to have their representation fixed and taken into consideration in any apportionment of senators and representatives. This is conceded by relators in their petition in so far as Natrona and Weston are concerned. It is not alleged that they were entitled to no representation but on the contrary it is alleged that each was entitled to two representatives, notwithstanding which it is sought to have this court issue its writ which would in effect deprive them of any and all right of representation to which they are now entitled as separate senatorial and representative districts. If entitled to representation as alleged they constitute legislative territorial units under the provisions of the constitution. The conceding of the right to two representatives from each of those counties

by the allegations of the petition is inconsistent with and negatives the right of relators to have them deprived of separate representation as such districts.

The issue as to the existence of Big Horn county as a separate senatorial and representative district is not tendered nor is its right to representation in the legislature questioned except in the manner in which it would be affected by compelling an election to be held under the apportionment fixed in the constitution. We think upon the theory of relators' case as disclosed by their petition and the argument and brief thereon that they must be held to concede that these counties are now separate senatorial and representative districts and as such are entitled to representation in the legislature and that such right must be recognized under any apportionment act. The petition attacks the apportionment act as a whole upon grounds which do not involve the question of their existence or right as such districts to separate legislative representation. In all the computations made by relators in their petition and brief in attempting to show the injustice and inequality of the apportionment acts complained of, these counties are recognized and taken into consideration with all the other counties of the state as constituting separate districts for legislative purposes. Aside, however, from the rule that relators should be held bound by their theory and its logical sequence we are nevertheless compelled to the conclusion that these counties were constituted and have continued to be such districts by reason and in pursuance of legislative enactments ever since the apportionment act of 1893 and the organization of Big Horn and the admission of their senators and representatives elected under such act to seats in the third state legislature which convened on January 8, 1895.

By the act of 1907 the number of senators was fixed at twenty-seven and the number of representatives was fixed at fifty-six. It is thus seen that the relative number in membership of the senate and the house of representatives is within the constitutional provision and that the act is not objectionable on that ground.

It is urged that as no ratio was expressed in the act of 1907 that the ratio fixed in the act of 1901 was continued in force and should have been applied and followed in the former act. The act of 1907 after fixing the apportionment provides that all acts or parts of acts inconsistent therewith are repealed. It is contended that the apportionment must have been based upon such ratio in order to be valid but that as the legislature failed to follow it in the last act that it is for that reason invalid. It is contended by the respondent that that ratio was not the basis of the apportionment. The population of the state as determined by authority of law is a matter of legislative as well as judicial knowledge. The petition sets out the enumeration of the inhabitants of each county, and the total population of the state as shown by the state census of 1905. The number of members of the lower house and the number of members of the upper house of the legislature is fixed by the act. While the ratio is not in express words, and it would probably be better to have so expressed it, we should hesitate to hold such a bill unconstitutional upon that ground alone if it is apparent on its face that the legislature was guided by a ratio, and what such ratio was. In the absence of any expressed ratios the ratios are of course the number of inhabitants of the state divided by the number of senators, and such number divided by the number of representatives. It is a matter of easy calculation and when departed from is easily detected. Applying this rule we find that under the apportionment act of 1907, as each organized county constituted a separate senatorial and representative district, each of such districts was, inclusive of such minimum representation so fixed by the constitution, entitled to one senator for each unit of 3,771 inhabitants, and one representative for each unit of 1,818 inhabitants, and these ratios should have been so applied that each of such districts, even though its population were less than these units, should have such minimum representation. The apportionment made by the act of 1901 is, as alleged, inconsistent with

these ratios and as the act of 1907 is of a later date and based upon a later census enumeration, it necessarily follows from such inconsistency that such ratios were repealed by the last act.

It is contended by the respondent that the inequalities and defects alleged with reference to the apportionment in the act of 1907 were made within the legislative discretion, while it is argued by the relators that they constitute a clear and palpable violation of the constitution. These questions have been ably discussed by the attorneys who appear in this case.

We are not required to go into the question of how far the constitution has lodged discretion in the legislature when it provides that the apportionment must be made as near as may be upon a basis of the number of inhabitants of the county, nor in fixing a ratio, nor as to how far their discretion extends in fixing the number of the members of the house and senate so long as the proportionate membership fixed by the constitution is carried out, for we are met by an obstacle which confronts us upon the threshold of this case which renders it unnecessary to do so.

Sec. 2, Art. III, *supra*, fixes the term of the senators at 4 years, and that of representatives at 2 years, and provides that the senators elected at the first election shall be divided by lot into two classes as nearly equal as may be, those of the first class to serve two years and those of the second class to serve four years. This court takes judicial notice of the membership of the legislature and the terms of the senators as the senate is now constituted and the journal of either branch of the legislature, in so far as it is germane to and bears upon the question here involved.

At the first state election the senators as provided in section 4, sub-title Apportionment, *supra*, numbered 16 in all and the membership of the house of representatives was fixed at 33, and were to be elected from the districts as therein provided. The term of the senators was fixed by lot as provided in Sec. 2, Art. III, *supra*. Neither Big

Horn, Natrona nor Weston counties were mentioned in that apportionment, but constituted parts of the counties therein named for legislative purposes; they have, since the framing and adoption of the constitution, been organized and as already stated now constitute separate senatorial and representative districts, and as such are now entitled to representation and have respectively been represented in both branches of the legislature since 1895. The classification of the senators and fixing of the long and short term by the first state legislature in accordance with the constitutional provision and following the rule therein prescribed together with the increase of membership of both houses as provided from time to time, whether such senators were elected under a constitutional or unconstitutional apportionment has brought about the condition that there are now 13 senators whose term of office does not expire until the first Monday in January, A. D. 1911. One of these senators is from Weston county, which is not entitled to any representation as a separate senatorial and representative district under the apportionment fixed in the constitution and under which the relators seek to have this court direct the election to be held. Under the constitutional apportionment the number of senators, as already stated, was fixed at 16, and were divided among the several counties of the state as provided in Sec. 4, Sub-title Apportionment, *supra*, and to be elected from the several senatorial and representative districts as there established. (Sec. 18, Art. XXI, Schedule.) If, by any possibility, this court had the power to interfere with and exclude the senator from Weston county from his seat in the senate, then under the contention of relators there would be 4 senators to elect at the ensuing election and 33 representatives.

It was clearly the intention as gathered from the constitution that one-half of the senators should hold over, and that the holdover senators should be taken into consideration in whatever apportionment act that should thereafter be passed by the legislature. (Sec. 2, *supra*.) It is

equally apparent that this provision of the constitution would be distorted and practically disregarded if the relief here sought were granted, for it would result in a senate consisting of 12 holdover senators and 4 to be elected for a full term. As to when or under what conditions this matter would right itself may perhaps be a question of minor importance, and it may be that it is a condition that was not foreseen by the framers of the constitution, yet it is purely a matter of speculation as to when, if ever, the constitutional proportion would or could be re-established. If the senator from Weston county be included, then the election of four senators under the apportionment found in the constitution would make the number of senators 17, whereas the election of representatives from certain districts named is limited to 33. We would thus have an unconstitutional legislature, for it is expressly provided that in no case shall the number of representatives be less than twice nor more than three times the number of senators. (Sec. 3, Art. III, *supra*.)

It will be observed that each senatorial and representative district is a territorial unit. It can not be a senatorial and at the same time not a representative district.

If the constitution were susceptible to the construction that the county of Big Horn upon its organization, and the counties of Natrona and Weston upon the admission of the state, became legislative districts, and as such, without further legislative enactment entitled to the representation of one senator and one representative and that such senators and representatives should be considered as supplementary to the apportionment as made in that instrument, then, as it necessarily follows that no greater representation could be allowed in the absence of legislative enactment, it would be necessary to add the total of the minimum representation from these counties, or 3 senators and 3 representatives to the numbers respectively allowed in such apportionment, which would make 19 senators and 36 representatives. Upon the facts alleged, Natrona and

Weston counties were each entitled to one senator and one representative, and adding two senators and two representatives to the numbers respectively as fixed in that apportionment, there would be 18 senators and 35 representatives. It is only necessary to state the propositions and the resulting proportions as to membership of the senate and house to show the incorrectness of such reasoning, for a legislature so constituted would also violate the constitutional requirement that the number of representatives shall not be less than twice nor more than three times the number of senators.

The apportionment found in the constitution was based upon the number of votes cast at the election preceding the framing of that instrument. It was intended by the convention to apply only to the first state election. It was so stated in the debates and proceedings of the convention and it was further expected that the first state legislature would pass an apportionment act based on the provisions and requirements of the constitution. It was intended to be temporary in its application and was applicable to the conditions existing at that time. It does not partake of that fixed and enduring character of other constitutional provisions which never yield to legislative enactment; nor can it at any time, be applied so as to disturb conditions which are the legitimate outgrowth of such other provisions and which are permanent in their nature. Such inapplicability does not arise from the infirmity of the apportionment acts complained of, but from fixed conditions with reference to legislative representation which exist at the present time, and which are the outgrowth of other constitutional provisions. It does not follow that a valid legislative enactment is necessary to render this apportionment inapplicable. It may be so rendered by the operation of other constitutional provisions under which the legislative department of the government has been organized and established and out of which conditions have arisen which render it inapplicable without violating the spirit and express provisions of the

constitution. This question was not involved in any of the numerous cases cited in relators' brief. To review those cases and quote the constitutional provisions under which they arose and attempt to differentiate between those cases and the one before us would only result in a prolixity of words and obscure the meaning and ground upon which we have reached our conclusions. It may, however, be said that in all of those cases the courts have uniformly declined to interfere and declare an apportionment act unconstitutional when there was no prior or antecedent valid apportionment act to fall back to. This rule is well understood by the attorney for relators, for he has based his case and argument upon the theory as contended by him that there has been no valid apportionment act passed by the legislature since the state was admitted, and that being so, he claims that the apportionment fixed in the constitution is in force and that the ensuing election must be held thereunder.

It may be conceded, for the purposes of this discussion, that the present legislature was elected under an inequitable apportionment act, and it may be further conceded that there has not been a fair apportionment act passed since the constitution went into effect, but that does not render the legislature so elected under such apportionment act illegal nor authorize or empower this court to inquire into the qualification or right of any one to his seat therein. Such right cannot be questioned in the courts. (People *ex rel.* Sherwood v. State board of Canvassers, 129 N. Y., 360; 29 N. E. 345; 14 L. R. A. 646; 10 Cent. Dig., 127, Tit. Const. Law.) The last and final arbiter of such question is the legislature itself and each house is the sole and exclusive judge of the election and qualification of its own members. Such determination is so far judicial in its nature as to make one so admitted a member not only *de facto*, but *de jure* also. In speaking upon a similar question where an apportionment act was assailed as being unconstitutional, the Court of Appeals of New York say: "As already said, the senate

and assembly elected under the apportionment act and actually assembled, constitute in any respect a *de facto* legislature. As a *de facto* body each house has, under the constitution, not only the exclusive power, but the exclusive right, to judge the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat becomes thereby a *de jure* member of that house, even though the courts, were such a question triable before them, might be of a different opinion. It follows, therefore, that not only is the present legislature a valid legislature, but that each member thereof, so long as the particular house to which he belongs does not oust him, is to all the world not only a *de facto*, but a *de jure*, member, and he is entitled to all the privileges of a member * * *." (*In re Sherrill*, 81 N. E., 124, 133, 134.) The same principle was recognized by this court in *State ex rel. Bennett v. Barber et al*, 4 Wyo., 56. That was a proceeding in mandamus to require the state board of canvassers to canvass certain returns of the votes cast for the relators for members of the house of representatives from Carbon county at the election held on Tuesday, November 8, 1892. It was there urged upon demurrer to the petition and alternative writ that the court was without jurisdiction to grant the writ because of the constitutional and statutory provision to the effect that each house shall judge of the election, returns and qualification of its own members. The late Justice Conaway, speaking for the court, at page 71, said: "In such cases, the courts are not the last or the principal bulwark of the rights of the people in choosing their representatives. The final and plenary jurisdiction, upon which the people must rely in the last resort in such cases is that of the house of representatives itself. And courts will not entertain the idea that other tribunals, in which the constitution and the laws have vested some small portion of judicial power, will not exercise such power with as much wisdom and justice as could the courts."

We think from the foregoing statement of the law that there is an entire absence of power in this court to question the right of any member of the legislature as now constituted to his seat therein or of any holdover senator to his seat in the legislature to be convened on the second Tuesday in January, 1909, nor have we the power by any ruling in this case to oust such senator from his right thereto. The senator from Weston county must, therefore, be treated as such *de jure* for the full term for which he was elected and qualified, and any apportionment made or election held must be with the view that he and the other holdover senators will be members of and entitled to a seat in the senate to be organized on the second Tuesday in January, 1909, and that their right to seats therein is, and will be independent of any intervening election.

What is here said with reference to the senator from Weston county is equally applicable to the senator from Crook county.

It will be observed that the senatorial and representative district of Crook county as established in the constitution included the territory embraced within the boundaries of Weston county as provided in the act creating the latter, and as such district it was entitled to a representation of one senator and two representatives. The senator from Crook county is also a holdover senator, he having qualified as such on January 8, 1907, and his term does not expire until the first Tuesday in January, 1911. To fall back to the constitutional apportionment means also to fall back to the legislative districts as therein established and those counties would be entitled to but one senator, whereas, they now have two holdover senators whose right to hold their seat is a question which has been passed upon by the legislature itself, and as already stated, its judgment and action thereon is conclusive upon this court. It is difficult to understand how in view of the present unyielding conditions the apportionment made in the constitution can be applied and its integrity and that of the

constitutional provision, with reference to the relative membership of the senate and house of representatives, be preserved. With two senators from a district which was only entitled to one under that apportionment, then to keep down the number of senators to sixteen as therein prescribed, some other district as established therein must be deprived of a senator to which it was entitled, a proceeding that would not be any more within the power of this court than to deprive either Crook or Weston of its senator. Giving the other districts under that apportionment the right of representation as there fixed, and to which they would be entitled, then it necessarily follows that one of those districts having a double senatorial representation the number of senators who would be entitled to seats in the next legislature would be 17, or one more than the apportionment provided for and the number of representatives would at the same time be less than twice that number.

The senatorial and representative district of the county of Carbon as established by the constitution in connection with the act creating and prescribing the method of the organization of Natrona county included for the purposes of representation in the legislature the territory embraced within the boundaries of the latter. Under the apportionment, Sec. 4, Sub-title Apportionment, *supra*, this district was given two senators. Carbon county alone, and ever since the creation of Natrona into a separate legislative district, has itself elected its senators and representatives. At the general election held in 1906, it elected two senators for a term of four years each, commencing on the 8th day of January, 1907, and ending on the second Tuesday in January, 1911, and each duly qualified for such term and they will be entitled to their seats in the next legislature which convenes on the second Tuesday in January, 1909. They were not elected by the people of Natrona county, for that county and its people had no voice in their election. To apply the apportionment as fixed in the con-

stitution would not only deny Natrona the right to elect a senator, but compel it to submit to representation in the senate by non-residents of that county and who were elected solely by the inhabitants of another county and in whose election the inhabitants of Natrona county had no voice whatever. Such senators were not elected from the districts as established in the constitution but by the inhabitants of a part only of such district, and yet this court would be without power to dispossess said senators of their office.

The legislative districts of Fremont, Johnson and Sheridan as established in the constitution were each entitled to one senator and two representatives. As such they each included a part of the territory now embraced within the limits of Big Horn. Since the organization of Big Horn county the territory included therein has been detached from the counties from which it was taken. The senatorial districts of Sheridan and Johnson each have a senator who was elected at the general election in 1906, and who has duly qualified and whose term as such does not expire until the second Tuesday in January, 1911, and each is entitled to his seat in the senate which is to assemble and organize on the second Tuesday in January, 1909. It is apparent that the same condition exists as to the people of this county that exists as to the people of Natrona. They, by an election held under the apportionment and from the districts as made and established in the constitution, would be denied the right to elect a senator as a separate senatorial and representative district and would be compelled to submit to representation by non-residents of the county and in whose election they had no voice and who also were not elected from the districts as established in the constitution, but by the inhabitants of a part only of such districts.

The writ of mandamus is referred to in the text books and the decisions as a writ of right. The nature of the writ should not be confounded with the right to have it

issue. It will only issue in the sound discretion of the court. (*People v. Olson*, 215 Ill., 620, 622; 33 Cent. Dig., 5 Col. 2053.) Such discretion means only that the question as to whether the writ ought to issue depends upon the result of a judicial examination of the facts either as alleged or in proof. Such facts or proof must show at least a clear legal right in the relators and that mandamus is the proper remedy. The relators must show a clear legal right to which they are entitled and which is withheld or threatened to be withheld from them, and that it is the legal obligation or duty of the respondent to perform the act sought to be coerced and that the performance of such act can only be secured through and by means of the writ.

It is said by some of the authorities that if a legal right is withheld from the relators the consequences of securing such right through the issuance of the writ ought not to be considered. The courts are not in harmony on this question, but seem to have been governed by the facts in each particular case, so that each case stands practically upon its own footing. The determination of the question in each case necessarily involves the question of the right sought to be secured and the effectiveness of the remedy for that purpose. There is an underlying principle in all the cases that if mandamus be not the proper remedy or would be ineffectual to secure the right sought then it should not issue for in such case it would be of no benefit. It is also fundamental that the legal right to the issuance of the writ never exists to coerce the performance of an illegal act, and that question must be determined upon the facts and conditions existing at the time the application for the writ is made and in determining that question the courts may and should take judicial notice of those conditions which are germane and exist as to a co-ordinate branch of the government and which are the legitimate outgrowth of constitutional provisions. In *Spelling, Injunctions and Extraordinary Remedies*, (2nd Ed.) at

Sec. 1,378, it is said: "It would be idle to discuss the question whether any court has power by any manner of process to compel the performance of an act violative of existing statutes." In *People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 645, it is held that the writ will never issue to accomplish the violation of a constitutional provision. In 26 Cyc., at page 150, it is said: "When it appears that the act sought to be coerced would be unauthorized by law, * * * the writ will be denied." The text is supported by an abundance of authorities cited in the foot notes. Nor will mandamus issue to command an officer to do that which he could not lawfully do without such mandate. (26 Cyc., 166; *Rosenthal v. State Board of Canvassers*, 50 Kan., 129, 32 Pac., 129, 19 L. R. A., 157; *Clark v. Buchanan et al*, 2 Minn., 346 (Gil. 298.)) In *State ex rel. v. County Commissioners*, 75 N. W., 579, the Supreme Court of Nebraska say that "the remedy by mandamus must rest upon the legal rights of the relator, upon one hand, and upon the legal obligations and duties of the respondent, upon the other hand. It cannot be predicated solely upon the equities existing between the parties." To the same effect is *Davis v. Miller Signal Co.*, 105 Ill. App. 657, 661.

The counties of Big Horn, Natrona and Weston, not being organized at the time the constitution was framed and adopted, constituted a part of and were embraced in the districts established by the apportionment fixed in the constitution. They have since been organized, the former after the state was admitted and the two latter prior thereto, and as already stated, have been by legislative enactment constituted and are now separate senatorial and representative districts, and as such each is entitled to representation in both branches of the legislature. They have become such districts in pursuance of law, and having been so created they cannot as such be here questioned. The section of the constitution fixing the apportionment says that until otherwise provided by law the senators and represen-

tatives shall be divided among the several counties of the state as therein provided. These counties were not established as separate senatorial and representative districts in that section, but their rights have matured under other constitutional provisions. To issue a call for an election under that section of the constitution would necessarily exclude them from the call as separate districts and deprive them of their present constitutional right to elect their senators and representatives. The provisions of the constitution with reference to the apportionment then made are mandatory; they are exclusive as well as inclusive. They include counties therein named, and established as separate senatorial and representative districts, and by all rules of construction exclude districts not so established. Although the counties of Big Horn, Natrona and Weston formed a part of such districts they now constitute separate districts in themselves. The writ here sought could only apply to the districts there named and as then constituted, and must as measured by the relief sought be limited to those districts. It is not pointed out how or by what authority the respondent under that apportionment could notify the commissioners of Big Horn, Natrona or Weston counties of the number of senators and representatives either was entitled to elect as a separate legislative district.

Under and by all rules of construction they must be held to be excluded from and disregarded in the apportionment fixed in the constitution, as separate senatorial and representative districts, and if the writ issue as here prayed the respondent must notify the commissioners of every organized county in the state embraced in the districts then established, and no other, of the number of senators and representatives to be elected or voted for in the respective counties so notified. He would be required and limited by the writ to notify those counties alone and thus ignore and withhold any notice to the counties of Big Horn, Natrona and Weston as separate senatorial and representative districts. Further, as already stated, an election in pur-

suance of that apportionment could not affect the title of either the senator from Weston county or the senator from Crook county to his seat in the legislature, and we would then have seventeen senators and thirty-three representatives, which would be an unconstitutional legislature.

This court has no power to apportion the number of senators and representatives. It could not force upon the people of the state an illegal apportionment act. It can only pass upon the questions presented. It has no power to compel the respondent to do an act which is unlawful and it is clear that he has no authority to issue notices of an election which if held as prayed by the relators would confer no right upon the persons elected in pursuance thereof to organize as a valid and constitutional legislature. Nor is this court authorized to compel him by its writ to do so. It would be lending the power of the court to the violation of constitutional and vested rights, to partially disfranchise three of the counties of the state, to in effect declare by its allowance a vacancy in the office of either the senator from Weston county or the senator from Crook county, or to require the respondent to issue notices of an election for senators and representatives so that the latter are less in number than twice the number of those who are entitled to a seat in the senate, and which would be a legislature which is unauthorized by the constitution.

In order to entitle the relators to the writ it is incumbent upon them to show a prior valid apportionment to fall back to. This proposition is substantiated by the following cases cited in their brief: *Giddings, Relator v. Blacker, Secy. of State*, 93 Mich., 1, 16 L. R. A., 402; *Board of Supervisors v. Blacker*, 92 Mich., 638, 16 L. R. A., 432; *People ex rel. Carter v. Rice*, *People ex rel. Pond v. Supervisors*, *Horn v. Board of Supervisors*, 135 N. Y., 473; 16 L. R. A., 836; *Parker v. State ex rel. Powell*, 132 Ind., 419, 32 N. E. 836; 18 L. R. A., 567; *State v. Wrightson, County Clerk*, 56 N. J. 126, 22 L. R. A., 548; *Denny, Clerk, v. State ex rel. Basler*, 144 Ind., 503, 31 L. R. A., 726; *People ex rel.*

Woodyat v. Thompson, County Clerk, 155 Ill., 451; State ex rel. Attorney General v. Cunningham, Secy. of State, 15 L. R. A., 568; State ex rel. Lamb v. Cunningham, Secy. of State, 83 Wisconsin, 90; 17 L. R. A., 145. This rule we think is equally applicable to an apportionment made by the constitution which was intended to be temporary in its nature and which has not been directly superseded or displaced by legislative enactments alone but which has been rendered inapplicable to conditions which now exist and which are the outgrowth of the establishment and organization of the legislative department of the government along lines and rules prescribed by other constitutional provisions. Upon the facts alleged the apportionment acts of 1901 and 1893 possess the same infirmity as the act of 1907 and as we have seen the apportionment fixed in the constitution has been rendered inapplicable to the legislative department as now constituted under other provisions of that instrument.

Upon principle and authority as to that branch of the case it is clear that the relators are not, upon the allegations of their petition, entitled to the writ, and that being so this court is not called upon nor is it necessary to decide the constitutionality of the apportionment act of 1907. The relators have no standing to ask this court to decide that question as a mere abstract question of law. (North v. Trustees &c., 137 Ill., 296; People v. Olson, 215 Ill., 620; Kennealy v. City of Chicago, 220 Ill., 485, 505.) They must show that a legal right to which they are entitled is withheld from them, that is to say, they must show a prior apportionment under which the election of a valid and constitutional legislature can be held, that they are entitled to but are denied the right to elect their proportionate membership of a legislature under such prior apportionment; that it is within the power and that it is the legal duty of the party against whom the remedy is sought to perform the act which will secure them that right and that they are entitled to the writ to compel the performance of such act.

As already stated they are not in a position to invoke the extraordinary powers of this court when the effect of the issuance of the writ would be violative of either the statutory or fundamental law of the state, no matter how much they may deem themselves injured or how inequitable or unjust the apportionment act of which they complain may be. The wrongs alleged cannot be corrected by mandamus upon their case as made in the petition, without disregarding express constitutional provisions and rights which have matured thereunder, the disregarding of which by this court would in any event be as violative of constitutional provisions as the legislative enactments of which they complain.

The demurrer will be sustained, and should there be no further pleadings filed, the writ will be denied.

BEARD, J., concurs.

POTTER, C. J., concurs in a separate opinion.

POTTER, CHIEF JUSTICE. (Concurring.)

I concur in the conclusion and the grounds thereof stated in the opinion delivered by Justice Scott as the opinion of the court, and I would ordinarily be content with the simple announcement of my concurrence. But owing to the unusual importance of the case itself, the questions involved, and the grave duty cast upon the court in their determination, as well as the peculiar situation disclosed by existing conditions, if the claims of the relators be correct as to the validity of the legislative enactments called in question, I desire in a separate opinion to set forth the reasons which in my opinion irresistibly lead to the conclusion and disposition of the case announced in the principal opinion. This I do, not alone of my own inclination, but following also the desire of my associates. I do not expect or hope to add materially to the main opinion, and much that I shall say will be but a repetition of that already said, though perhaps differently expressed.

The relators have brought this case seeking a certain remedy for the enforcement of alleged rights of themselves and others in a like situation as citizens and electors of the state, which rights are alleged to have been interfered with through the enactment of an invalid law by the legislative department of the state government. The only power and jurisdiction that this court would have to pass upon the questions involved in the inquiry whether there has been an infringement of the rights of relators or other citizens and electors by the acts aforesaid must depend upon the power of the court to afford the remedy sought, or at least some fairly adequate remedy, if the allegations of the petition as to the violation of such rights be true in fact and law. The court does not sit nor is it empowered to determine purely abstract questions of law in any case unconnected with the enforcement of legal or equitable rights, and if there is any distinction depending upon the character of the case, the court should be peculiarly careful to ascertain that the question is actually presented and that a decision thereon is necessary before considering the constitutionality of a statute, or at least before adjudging its invalidity; and especially is that true when the statute assailed affects the composition of the legislature itself.

I do not doubt as a general rule the power and duty of the court in a proper case to pass upon the constitutionality of a legislative act, and to adjudge it to be invalid if found to conflict with constitutional provisions, nor, when that question is necessarily involved in the disposition of a pending case properly instituted, to determine whether an act apportioning legislative representation is violative of constitutional requirements, and to declare the same void if found to conflict with such requirements. But the decision should be necessary to a just determination of the case. Judge Cooley, in his work on Constitutional Limitations stated the principle as follows:

"Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless

a decision upon that point becomes necessary to the determination of the cause. * * * In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." (Cooley's Const. Lim., 3rd Ed., 163.)

Another rule of controlling importance in considering the validity of a statute is that all reasonable doubts must be solved in favor of the legislative act. Such a question is to be approached by the judiciary with great caution, and examined in every possible aspect, and a statute should not be declared void, unless its validity is beyond reasonable doubt. (Id. 182.)

With these principles in mind I propose briefly to examine the allegations and contentions of the parties to ascertain where they lead.

First, it is alleged and contended that the apportionment act of 1901 prescribed a ratio for the apportionment of senators and representatives respectively, and that the act of 1907 is void for the reason that the apportionment therein made was not based upon the ratio so established. In other words the position of the relators is that as ratios were not expressly prescribed in the act of 1907, the ratios of 1901 continue in force and are controlling upon the question of apportionment until new ratios are prescribed. While it is contended generally that the act of 1907 is void on the ground that the senators and representatives are not thereby apportioned among the counties as nearly as may be according to the number of inhabitants, the particular theory of the petition is that the ratios of 1901 controlled and were not followed. It is true that the act of 1907 does

not expressly prescribe or fix ratios, but it does apportion the senators and representatives among the counties, and in a separate section it declares that "all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

Now, conceding that the apportionment made by the act of 1907 does not follow the ratios of 1901, the act of 1901 in prescribing ratios is then inconsistent with the provisions of the act of 1907. It was clearly within the power of the legislature to repeal the former act, and when it made an apportionment and repealed all inconsistent provisions of other acts, it necessarily repealed the inconsistent ratio provisions of the act of 1901. It is clearly more reasonable and logical to so hold than to say that the later act is invalid because inconsistent with the former one. Of course the repeal would not result if the apportionment in the act of 1907 is void upon other grounds, because if the apportionment part of the act should be declared void, the ratios prescribed by the act of 1901 would not be inconsistent with any of its provisions.

But there is still another and sufficient answer to the claim that the ratios of the act of 1901 controls until other ratios are fixed. The constitutional provision for ratios is found in the section requiring the legislature in 1895, and every tenth year thereafter, to provide by law for an enumeration of the inhabitants of the state, and it is directed therein that at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, the legislature shall "revise and adjust the apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law." The words "such enumeration" in the latter part of the section clearly refers to the last preceding enumeration. It is a publicly known fact and conceded in the petition that the legislature did provide for an enumeration in 1905, and that such enumeration was made. Upon that enumeration, therefore, it be-

came the duty of the legislature in 1907 to revise and adjust the apportionment, as well as according to ratios to be fixed by law. Now the act of 1901 does not prescribe ratios according to the number of inhabitants generally, but the provisions of that act in that particular are that the ratio fixed for senators and representatives respectively shall be based upon the enumeration of inhabitants made in 1900 by authority of the United States. Sections 3 and 4 of the act are similar in this respect, the one providing a ratio for senators and the other for representatives. It will be sufficient, therefore, to quote from Section 3. It reads:

"Each organized county shall have one senator for every six thousand inhabitants and one senator for every fraction over 3,500 inhabitants in such county, as shown by the enumeration of such inhabitants made by the authority of the United States, in the year one thousand and nine hundred."

What can be clearer than that this ratio so fixed and qualified would not control and indeed could not control in an apportionment made subsequent to the state enumeration of 1905, without violating the constitutional requirement that after the later enumeration it should constitute the basis for a revision and adjustment of the apportionment?

Again, the act of 1901 did not fix ratios for all the senators and representatives, but only for those in addition to the one senator and representative respectively allotted to each county. It is true that under the constitution each county is entitled to at least one representative in each legislative body. That, however, does not mean that the ratios shall not be fixed for all, but only that whatever the ratio each county shall have at least one senator and one representative. Nor does it mean that the ratio is necessarily the number of inhabitants in the county having the smallest population, for that would arbitrarily determine the number in each body, and would prevent keeping up the relative size of the two bodies as required by the con-

stitution; and, moreover, the legislature is authorized to determine the number to compose the senate and house respectively, restricted only by the constitutional provisions as to the right of each county to be represented as above stated, that the apportionment shall be based upon the enumeration of the inhabitants as aforesaid according to ratios fixed by law, and that the senators and representatives shall be divided among the counties as nearly as may be according to the number of their inhabitants. As I understand these provisions they require that an apportionment shall be made by dividing the senators and representatives among the counties according to the number of their inhabitants, as nearly as may be, on a basis of the last preceding enumeration made as provided by law, according to ratios to be fixed by law; provided, that each county shall have at least one senator and one representative, even though the number of its inhabitants may be less than the prescribed ratios.

It will be observed that contrary to the rule prescribed in many states, the senatorial and representative districts are fixed by our constitution, each county constituting such a district. It would seem therefore that to prescribe a ratio for the excess only over the minimum allowed to each county might be held to depart from the letter as well as the spirit of the constitution.

There is a further answer that might be made to the claim that the ratios fixed by the act of 1901 are controlling until other ratios shall be expressly prescribed. In the section of that act fixing a ratio for apportioning members of the house of representatives, it is provided that no county shall have a less representation, either in the senate or house, than is allowed to such county in the legislature of 1901 which passed the act. The ratio as to representatives was therefore again qualified, and, if controlling at all, it carries the proviso with it, which might result, as it apparently did in that act, according to the averments of the petition, in awarding to a county a greater number of representatives than it would be otherwise entitled to upon the

ratio without such qualification. And it might result, in case of a decrease in population either through a division of counties or otherwise, in a direct violation of the constitutional provisions relied on here to invalidate the act of 1907. At any rate it seems to make a special ratio as to certain counties, or to exempt them from the ratio altogether.

For either of the reasons above mentioned I think it may well be doubted whether the basis of the particular objections set out in the petition against the act of 1907 has any support upon a proper construction of the constitution and statutes.

However, it is contended that the constitution not only requires that an apportionment shall be actually made according to ratios, but that such ratios shall be fixed by law. With that view I am inclined to agree. The constitution seems to contemplate that the basis of the apportionment shall not be left to conjecture, nor for ascertainment upon independent computation. But it must be remembered that the purpose of the provision, in connection with others upon the same subject, is to secure a fair and equitable apportionment according to the number of inhabitants of the respective counties. Upon a mere technical objection that ratios were not expressed by law, without it appearing that in fact an apportionment was not based upon ratios that were fair and reasonable, and that such apportionment was unfair or inequitable, or not made according to the number of inhabitants as nearly as may be, there would, in my opinion, be strong reason for hesitation on the part of the court to declare an act void.

It is here claimed by the Attorney General, in defense of the act, that ratios were employed, and that they are to be discovered as to both bodies by dividing the number of inhabitants of the state by the number of members provided for each body respectively. Such a division produces a quotient or ratio for the senate of 3771, and 1818 for the house.

Upon the basis of the quotient so found there would appear to be only slight inequalities, and such as might perhaps be expected in any apportionment act, except in the following instances. After allowing Crook county two representatives it would have a fraction over of only 201, but it was given three. After allowing Weston county two representatives, there would be no fraction remaining, but it would lack thirty-two of having the full number for two. It was given three. Uinta was given seven representatives. It had, in addition to enough to entitle it to that number, a major fraction of 1,766 or within fifty-two of the number so found as a ratio for apportioning representatives.

No other county had a major fraction, that is to say more than one-half the number required for a representative, after receiving the number of representatives allotted to it. But though Crook county was given a third representative, having a fraction of only 201 in addition to the number required for two, Natrona county, with a fraction over of 624, was given but one representative, Sheridan, with 875 more than enough to entitle it to five representatives, was given only five, Albany county, with 902 in excess of the number entitling it to five, was given only five, and Converse was given only 2, although it had 532 more than the number required for two.

None of the counties, except Uinta, however, had a large enough fraction over the number required for the representation given it, which would seem to afford reasonable ground of complaint that it had not received its full quota, that is, none except Uinta was left with a major fraction unrepresented, if we may assume that the ratios aforesaid were in fact adopted or employed. But on the other hand, the particular counties above mentioned might perhaps find cause to complain that Weston county was given a third representative in the absence of any number of inhabitants in excess of that required for two, and that Crook was given a third representative upon a smaller fraction than several other counties had, and that therefore those coun-

ties are given greater representation in proportion than other counties. The complaint therefore would be not that any county, except Uinta, is discriminated against by not apportioning to it all that it was entitled to, but that the discrimination consists in allowing at least one county, and perhaps two, a larger representation than it or they would be entitled to under any ratio based upon population.

Adopting the ratio above suggested the Attorney General contends that the words "as nearly as may be" vest in the legislature a reasonable discretion not subject to control by the courts; that in considering the legislative action, some regard must be given to the difficulties necessarily encountered in the passage of an act, and especially one of this nature where sectional jealousies and differences are bound to be displayed; and that nothing but gross inequalities, or a plain departure from the constitutional principle, will justify the court in adjudging an apportionment act void.

The relators not only assail the act of 1907, but they allege and contend that the two previous acts—those of 1901 and 1893, are each void, upon the ground that the ratios established thereby respectively were not followed in making the apportionment. The Attorney General concedes the invalidity of said former acts, but upon different grounds. He maintains that each act establishes ratios in an unconstitutional manner, viz.: By applying them to some of the members of each body only; and he also contends, as I understand, that the inequalities of the apportionment made by each of said acts are greater than those appearing in the act of 1907.

By the admission of the relators, therefore, as well as that of counsel for respondent, if the act of 1907 is invalid, the acts of 1901 and 1893 are likewise invalid, and if the act of 1907 is to be held unconstitutional, both of the preceding acts must also fall. This would leave as the only apportionment the one made in the constitution itself, under which the elections for senators and representatives were

held prior to the session of 1893, and it is under that apportionment that the relators ask this court to direct the notices for the election this year of senators and representatives to be given. That is the only remedy sought by the relators in this proceeding, and the only one they would be entitled to, if their claims as to the various apportionment acts should be upheld. This case is brought in this court as an original proceeding under its jurisdiction in mandamus as to state officers. The duty sought to be controlled is the requirement of Section 206, Revised Statutes, 1899, that in an election year, within the period therein stated, the Secretary of State shall make out and cause to be delivered to the board of county commissioners of each county a notice in writing, stating what officers, other than county and precinct officers, are to be elected and voted for in the several counties.

I do not doubt that the question as to the constitutionality of the act of 1907, and possibly the two previous acts, is presented in this case, and I suppose the court would have jurisdiction to determine that question in the first instance, before going to any other question in the case. But there is another question that would demand consideration, in the event that the apportionment acts should be decided to be unconstitutional, and upon its determination the right to the remedy sought would ultimately depend. Should we enter upon a full consideration of the constitutionality of the act of 1907, and adjudge it to be invalid, and then upon a consideration of the further questions, viz.: the right to have the notices for the election given under the apportionment in the constitution, should decide, as we would be compelled to do, that the right does not exist, on the ground that such apportionment is totally inapplicable under present conditions, at least so far as the power of the court to enforce it is concerned, the court would find itself in the position of having for no purpose whatever adjudged a legislative act void. While, therefore, the court might take upon itself the responsibility of deciding

upon the validity of the act, without first considering the other question, I doubt very seriously the propriety of doing so, and hold to the opinion that it is incumbent upon the court in the first place to ascertain whether the remedy herein sought is one that can or ought to be granted in any event. That seems to me as well as the other members of the court the most logical course, in view of the character of the questions involved.

I am aware that there are cases holding to the contrary view. (Parker v. State *ex rel.*, 133 Ind. 178; People v. Thompson, 155 Ill. 451.) I think that those cases are distinguishable from the one at bar owing to difference in the circumstances. In those cases it would have been necessary to examine and pass upon the constitutionality of a former act as determined by practically the same objections urged against the later, and I do not understand that the enforcement of such former act would leave various sections of the state totally unrepresented in one or other of the two legislative bodies, or that its enforcement, if validly enacted, would interfere with constitutional provisions.

In the Indiana case, however, there was a vigorous dissenting opinion by Judge Elliott upon the precedence of the questions in which he gave several excellent reasons for first considering the right to the remedy in any event. Among other reasons he mentioned the following:

"Courts will not send against a public officer the extraordinary writ of injunction or of mandamus, unless the complainant makes it appear that the writ will be effective in the particular case in which it is demanded" and, "The inexorable rule is that constitutional questions will never be decided unless their decision is indispensably necessary to a final disposition of the case actually before the court."

Upon appeal in a case of a similar nature the New York Court of Appeals decided the question of the validity of an apportionment act, and held it to be unconstitutional, although it made no order in the case for the reason that

the election had occurred under the act, but it was held by the court that the decision would not affect the official rights of the members elected, nor the acts of the legislature, the members whereof had been elected under the void act. (*In re Sherrill*, 81 N. E. 124)

We conceive that the situation here is greatly different from that apparently presented in other cited cases involving the validity of apportionment acts. But even if our conclusion in this respect would seem not to accord with the decisions by some other courts, we maintain upon principles well settled and universally recognized that under a situation such as is here presented it is eminently more logical and reasonable to inquire in the first place whether the remedy proposed through the intervention of the court is one within its power to grant without compelling a deviation from constitutional mandates.

It is, therefore, in order, before proceeding further with the discussion of the apportionment acts to take up the apportionment embodied in the constitution, together with other provisions therein contained, and review the situation now presented in connection therewith. It may be said here that it is not denied by counsel that as each house is the sole and exclusive judge of the qualifications of its own members, and as the terms of office of the members of the legislature that convened in 1907 have not expired, and will in no case expire until January next, that legislature was a *de facto* legislature, and its members are *de facto* members thereof and that its acts, if otherwise valid, cannot be assailed on the ground of the invalidity of any apportionment act under which the members were elected. It is indeed asserted by counsel for relators, and in that we agree with him, that the same legislature, if called in special session for that purpose, would have the power to pass a valid apportionment act if the one now assailed should be held to be invalid. That is simply a concession to a well settled principle applicable to the acts of public officers generally, as well as the lack of power of the court

by any order in this or any other proceeding to debar a member elected to either branch of the legislature from a seat in the body to which he may have been elected and admitted.

It may be here stated that had there been no subsequent legislation of any character upon the subject, the apportionment section of the Constitution would have remained the only apportionment law for this state. That was declared to be effective until otherwise provided by law. The general statement that it would constitute the apportionment until otherwise provided by law, shows that it was intended to have only a temporary existence or effect. Indeed, in another section it is stated that the senate and house *first elected* under the constitution shall consist of 16 and 33 members respectively, the members that were actually apportioned.

In the absence of any action by the legislature pursuant to constitutional provisions affecting the question of apportionment, the various sections of the state would have remained represented in the legislature as apportioned in the constitution, and very little difficulty or cause of complaint would have arisen, except that new communities might be unfairly represented; but there would not then have existed any legal ground of complaint, nor the condition of affairs that now confronts us.

But the legislature did act and did assume to enact apportionment laws, the first in 1893, under which the members of the legislature of 1895, 1897, 1899, and 1901, respectively were severally elected. In 1901, the second act was passed, under which the members of the legislature respectively of 1903, 1905, and 1907, were elected. Except for the first State legislature, and by the apportionment therein made "until otherwise provided by law," the constitution does not prescribe the number of members for either the senate or house of representatives. The legislature is not restricted in that respect, otherwise than as to the size of the two bodies in relation to each other. In

each apportionment act the number of members in each body was increased, the constitutional proportion between them, however, being maintained.

It is to be remembred that the constitution was framed by a convention held in September, 1889, while Wyoming was yet a territory, in anticipation of favorable action by Congress upon a bill or proposed bill for its admission as a state. When the bill would be considered or passed could not be known. This is not only evident from the nature of the question, but it was recognized by the convention, and provisions were inserted in the schedule to cover contingencies depending upon the date of statehood. (See Secs. 21, 22, Art. XXI, entitled Schedule.) These provisions had reference to the assembling of the legislature and the general election. The people of the territory voted upon and adopted the constitution at an election held in November, 1889. The act of admission was approved July 10, 1890, and thereupon the Constitution became effective. The first state election was held in September of the same year, and the first legislature of the new state convened in November, and remained in session until the latter part of January, 1891. Between the time of framing and adopting the constitution as aforesaid, and its taking effect, (here using the term "adopted" as referring to the vote of the people thereon) two new counties were organized, Natrona, which had been created from the northern part of Carbon in 1888, and Weston, created from the southern part of Crook, by the legislature of the territory that assembled in January, 1890.

The constitution provided (Art. XII, Sec. 1.) that "the several counties in the territory of Wyoming as they shall exist at the time of the admission of said territory as a state, are hereby declared to be the counties of the State of Wyoming." Under that provision it cannot be doubted that Natrona and Weston counties, having been created and organized prior to the State's admission, became upon such admission counties of the State. Big Horn county had

been created in 1888, but was not organized until after statehood. But it was held by this court that when the state was admitted, said county was a created but unorganized county of the state, and that its organization, though not its creation, was controlled by the restrictive provisions of section 2, Art. XII. (Board, &c. v. Perkins et al., 5 Wyo. 166.)

Neither of these new counties were mentioned in the apportionment of senators and representatives provided in the Constitution; and hence had there been no subsequent enactment of an apportionment law by any legislature of the state, the territory in such counties would no doubt have remained attached to the counties from which they were respectively taken, for the purpose of participation in the election of members of the legislature; for, although each county is expressly constituted a separate senatorial and representative district by the constitution itself, that provision would necessarily be read in connection with the section making a specific apportionment, which, for that purpose, mentioned the counties as they existed when the Constitution was framed. To prevent the non-representation of the territory and people included in the newly organized counties, they would necessarily be regarded as part of the original counties respectively, for the purposes of legislative elections and representation. And that course was in fact followed in the election of the first legislature that convened in November, 1890, and the second that convened in January, 1893.

By the apportionment act of 1893, Natrona and Weston counties were each awarded one senator, and one representative, and it was provided that Big Horn County, when organized, should have one senator and one representative. Omitting Big Horn County, the senate and house were by that apportionment to be composed of 18 and 37 members respectively, and with said county the relative membership was to be 19 and 38; thus preserving the constitutional proportion, with or without that county. In

electing senators at the election preceding the session of 1893, it happened that a senator elected for four years from Carbon County resided in that part of its original territory which had become the County of Natrona. By a provision of the act of 1893 applicable, generally, to every case of that kind, he was to represent, during the remainder of his term, the county wherein he resided, viz.: Natrona.

In the legislature of 1895, and each succeeding legislature, Natrona and Weston counties were each separately represented by a senator, as well as representatives, and commencing with the session of 1897, Big Horn county has been separately represented in each body. Each senator from said counties was elected for the term of four years, the term of office fixed by the constitution. There having been no apportionment act passed between 1893 and 1901, the number of members elected after the organization of Big Horn county, and until and including the session of 1901, continued at 19 and 38 respectively. At the session of 1895, the senate was composed of 18 members, of whom nine, or one-half the number, had been elected at the last preceding election for the term of four years, so that the two classes at that session were equally divided. At the session of 1897, there were ten senators who were to hold office for four years from that time, having been elected at the fall election in 1896, as against 9 whose terms would expire in two years, the latter having been elected at the election held in 1894; and, therefore, at the next succeeding session there were nine newly elected members to serve for four years as against ten in the other class whose terms were to expire before the next following biennial session. This proportion was of course maintained at the session of 1901, the numbers being again reversed, the four-year class containing ten members.

The apportionment act of 1901 provided for a senate of 23, and a house of 50 members, giving each of the new counties separate representation. This increase in the senate resulted in the election of 13 new senators at the election in 1902, so

that the two classes of senators were represented at the sessions of 1903, 1905 and 1907, by 13 and 10 respectively, which was as nearly equal as they could be made, considering the increase in the number of senators, and the term of office of those to be newly elected as provided in the Constitution. The last act, and the one here particularly complained of, that enacted in 1907, provided for 27 senators and 56 representatives. At the session of 1907, 13 new senators were admitted who had been elected in November, 1906, for four years, making it necessary under the act aforesaid, if it shall stand, for the election of 14 senators at the election this year; and thus the relative number in the two classes will be maintained as contemplated by the Constitution.

The present holdover senators, that is, those who will be entitled to seats as senators at the regular session to be held in January, 1909, by virtue of their election in 1906, for four years from January, 1907, were elected in the numbers stated from the following named counties: 2 from each of the counties of Albany, Carbon, Laramie and Uinta, and one (1) from each of the counties of Crook, Johnson, Sheridan, Sweetwater and Weston. In order to give to the respective counties named in the apportionment found in the Constitution the number of senators awarded them thereby, without interfering with the holdover senators above mentioned, it would require an election of a senator in each of the following counties, viz.: Converse, Fremont, Laramie and Sweetwater, or a total of four (4), which, when added to the number of holdovers, makes 17, or one more than the number of senators provided for by the apportionment in the Constitution.

We are, therefore, confronted with this situation, that should the Secretary of State be commanded to call an election under said apportionment it would be necessary for him to determine the counties wherein an election for a senator or senators should be held, unless indeed this court would be authorized to make such a determination and embody the

same in the writ. But whether that duty would devolve upon the Secretary or the court, it would be necessary to either disregard the senators already elected, and call for an election of an entirely new body of senators, or arbitrarily disregard the right of one or more of them to the office to which they have been elected and admitted, or, in order to keep the number at 16, to arbitrarily ignore one of the four counties entitled to a senator to make up its representation as fixed in said apportionment.

Should the senators already elected and seated not be disregarded, and we know of no authority on the part of the court or the Secretary to disregard them, then there would be 13 senators in one class, and not more than 4 in the other. And at any subsequent election new senators would necessarily be elected for the constitutional term of four years. It is, therefore, apparent, using former acts as an illustration, that should the senate under a new apportionment be composed of 23 as heretofore, or 27 as provided by the act of 1907, the newly elected senators would number 19 or 23, while the remaining class would consist of four only; and this inequality would continue to exist, whatever the number of senators, unless reduced to a very small number, thus defeating the very obvious purpose of that provision of the Constitution dividing the senators into two classes.

Again a great reduction in the number of senators would require a corresponding though less reduction in the number of representatives, since the latter are in no case permitted to exceed three times the number of senators. Moreover, if 17 members are to compose the senate, that will be more than one half the number of representatives, a condition forbidden by the constitution in the most positive language; as neither the court nor the respondent could add to the number of representatives, it would be imperative that there be not more than 16 senators, so that it would be necessary to either deprive some county of its representation prescribed in the apportionment of the Constitu-

tion, or some elected senator of his office. If it should be said that the senator elected from Weston county might be disregarded, the fact would be pertinent that he was elected from a part of the territory embraced in the Crook county district under the apportionment sought to be applied, and it is a matter of public state history that the first senator from that district resided in the territory that is now Weston county. While the present senator from that county was elected by the votes of only a portion of the inhabitants of the original district known as Crook county, the same thing is true of the present senator from Crook county; and the territory covered by that district as established by the apportionment in the Constitution has now two elected senators, whereas, it was given but one by that apportionment.

The incompetency of the court to enter an order that would effectively deprive any holdover senator of his office is recognized by all the authorities and the principle is so well settled as to require no citation of cases. But I may refer to a late case in Pennsylvania where a relator in *quo warranto*, claiming to have been elected a senator, questioned the constitutionality of an apportionment act, the court refused to decide the question on the ground that the relator had no such interest as gave him a standing to maintain the writ, and it was said: "Even a judgment of ouster against the respondent would not give the office to the relator, for his own qualifications and the regularity and validity of his election would still be subject to the investigation and judgment of the senate, which is the ultimate and supreme tribunal on these matters." (*Commonwealth v. Biddle*, 218 Pa. 234, (67 Atl. 355.)

The above statement of the present condition shows not alone the confusion and difficulties that would attend any attempt at this time to go back to the apportionment of the constitution, but to do so would deviate from mandatory constitutional provisions. It is evident that this court cannot in this case or any other either make an apportionment,

or unseat any senator already elected and admitted to that office, nor can we require the respondent, as Secretary of State, to do so, notwithstanding that the holdover senators may have been elected under an unconstitutional act. I wish also to state that the acts of 1893 and 1901, have not heretofore been questioned, at least in any judicial proceeding, until the institution of this case, but they have been acquiesced in by the people as well as the legislature. That fact does not of course, render them valid if in fact or law not so, but it does show that the people have elected their senators from time to time as therein respectively provided, and that the persons so elected have been admitted to the senate as members thereof by the only body authorized by the constitution to ultimately determine their qualifications as senators. But it will be said that the court has no concern with the difficulties or confusion that might flow from the remedy sought in the case, in determining the right to that remedy. Conceding that to be so as a general proposition, the court is concerned in this case with those matters, for they grow out of constitutional provisions equally as important and mandatory, if not more so, than those relied upon by the relators, and by which provisions the court as well as the legislature and the parties are as much bound. In Kentucky it was said by the Court of Appeals in a recent case, with regard to an apportionment act that had been in effect more than thirteen years, "The act of 1893 has gone into effect and the government has been organized under it. To hold it void would be to throw the government into chaos; and this no court is required to do." (Adams v. Bosworth, 102 S. W. 861.)

It would be an anomaly to say that a provision of the Constitution is itself unconstitutional or invalid as conflicting with another provision of the same instrument. We are not here saying that the apportionment made in and by the constitution "until otherwise provided by law" is unconstitutional or invalid for any reason. Such a position is far from our decision. But it is to be read and

construed in connection with other cognate provisions. When that is done if it is found impossible of enforcement, and at the same time maintain inviolate the permanent and mandatory provisions, which admit of no alteration by the court or legislature, then it is our duty to refuse to enforce it.

But in any view of the matter, our position goes a step beyond that. Keeping in mind the evident purpose of the apportionment temporarily made by the constitution, the acts adopted by the legislature, and up to this period acquiesced in by the people, have resulted in a condition impossible of correction by the courts, which must be regarded by the court, so far as this case is concerned, as equivalent to "otherwise provided by law," so as to render the apportionment in the constitution superseded and inoperative.

I do not mean to say that an invalid law would of itself destroy the operation or effect of the apportionment section of the constitution; but an act appearing to have been duly enacted and promulgated is to be regarded as valid until otherwise declared by competent authority, and we are now considering the propriety of passing upon the validity of the apportionment acts, if not the power of the court to do so; and what I do maintain upon the facts above stated is that a condition beyond the control of the court has been produced, which, so far as the power of the court is concerned to award the remedy here sought, has caused in effect the apportionment of the constitution to become inoperative.

Where it was sought to have an election for the legislature held under the apportionment act of 1879 in New York, instead of the act of 1892, assailed as void, and the court could see that if the act of 1892 was invalid, the act of 1879 was also void, and that to hold the later act void would relegate the people to the act of 1866, a law more than a quarter of a century old, the court said that "this would be a travesty on the law and upon all ideas of

equality, propriety and justice." (People *ex rel.* v. Rice, 135 N. Y. 473. In the same case, it appeared that the constitution provided that the establishment of senate districts should be based upon an equal number of inhabitants excluding "persons of color not taxed." The provision for the exclusion of persons of color not taxed in arriving at the number of inhabitants for the purpose stated had been inserted at a time when a man of color not taxed was not entitled to vote by express provision of the constitution. After the war of the rebellion, and the adoption of the 13th, 14th and 15th amendments to the Federal Constitution, the state constitution was amended by omitting the condition for the exercise of the elective franchise by a colored person, and other amendments were also adopted eliminating similar discriminations or provisions based thereon, but the one for excluding colored persons not taxed in computing the number of inhabitants when establishing senate districts was in some way allowed to remain. The question was presented to the court upon an objection to the validity of the apportionment act on the ground that persons of color not taxed had not been excluded in the establishment of senate districts. In the opinion delivered by Mr. Justice Peckham, it was held that the section was not to be construed as excluding such persons, notwithstanding its language, on the ground that the change in policy towards persons of color, clearly indicated by the constitutional amendments referred to, rendered it clear that the basis for the provision had been taken away; and it was held that under the conditions it should be regarded as impliedly repealed by the other amendments.

That case does not, of course, precisely touch the question before us upon the facts, but it does show that subsequent conditions were considered as having an important bearing upon the construction of a particular section of the constitution.

But there is an additional element in the case that I have not referred to, but which is mentioned in the principal

opinion, viz.: The declaration by the legislature in each apportionment act that each organized county shall constitute a separate senatorial and a separate representative district, following a similar declaration in the constitution. If that portion of each act is valid 'regardless of the validity of the remainder of the act, and I think there is strong ground for so holding, and, indeed am inclined to the opinion that it must be so held, though perhaps it may not be necessary to do so in this case, then there is the condition that certain established districts are not apportioned any representation by the apportionment in the constitution, and there would be a direct conflict between the apportionment section, which was intended to have only a temporary operation, and other provisions, such as that requiring each county to have at least one senator and one representative. Upon such a conflict the former and temporary provision must yield. Moreover, the legislative act so establishing the districts would then furnish the contingency, "other wise provided by law," upon which the section of the constitution in question was to cease. Although it would amount to a partial provision only, it would render the section of the constitution ineffectual, in consideration of the other related sections. As counsel for relators has contended, and the petition herein asserts, that the ratio provisions of the act of 1901 would not fall, if the section thereof making the apportionment should be adjudged void, I suppose it would be conceded on the part of relators that the section of said act declaring each organized county to constitute a separate senatorial and representative district, would likewise remain unaffected by the invalidity of the provision covering the apportionment of members. At least there would seem that every reason for maintaining that the ratio provisions are separable from the part alleged to be void would equally apply to the provision establishing the districts.

In the opinion handed down for the court, Judge Scott has called attention to the fact that two senators from Car-

bon county, the entire quota awarded that county by the constitutional provision, are holdovers, and were elected from that county as now constituted, so that by leaving them to represent that county would not only deprive Natrona county of any separate senatorial representation, but of any voice in the election of a senator. That would also be the case as to those portions of Big Horn county taken from Sheridan and Johnson counties respectively. In the case of the Crook and Weston county senators, it occurs to me that it might be a difficult matter upon any legal principle to determine which one, if either, should be deprived of the privilege of serving out the full term. Not only has the senator from Weston county been admitted as such by the senate, but at the last session he was elected vice president of that body, and is probably now holding that office.

The cases cited in brief and argument involving the validity of apportionment acts severally present a far different state of facts as well as different constitutional provisions, from those with which we are concerned. In many if not most of the cases the duty was imposed upon the legislature by the constitution of establishing districts according to the number of inhabitants and under certain other restrictions such as those of compactness and contiguity, but I do not recall a case where, if an election was held under a previous act, certain counties or sections would be deprived not only of representation, but of any voice in the selection of a representative.

Upon any view of the case at bar, should the writ demanded by the relators be granted, not only would there be caused inextricable confusion, but there would occur an inevitable deviation from the permanent provisions of the constitution concerning the formation of the legislature, and representation therein; and in my opinion therefore the only safe and reasonable course is to deny the writ on the ground that the relators have not shown themselves entitled to it, without deciding as to the validity of the apportionment acts.

INDEX.

ACCORD AND SATISFACTION.

1. A city having allowed and the owner having accepted a less sum than the amount claimed upon a bill representing an unliquidated claim for damages to abutting property caused by a change in the grade of a street, the presumption is that it was intended as full compensation, and in a suit for the balance the burden is upon the claimant to show a different understanding, where the previous allowance and acceptance are shown under the city's plea of accord and satisfaction. *City of Rawlins v. Jungquist*, 403.
2. An itemized bill of damages to abutting property of the claimant caused by a change in the grade of a street having been presented to a city, and the record of the meeting of the city board at which the bill was acted on showing only that the claim for damages account grading for a stated sum, being the total amount of the bill, was presented and that a less amount was allowed, the action of the board, in the absence of a contrary showing, is to be construed as a rejection of the part not allowed, and as an allowance of a part in full settlement of the claim. *Id.*
3. The several items of the bill being elements or integral parts of the damage resulting from a single cause, the fact that the amount allowed equals the aggregate of certain items, opposite which appears unexplained pencil marks, is not in itself sufficient to show that the allowance was intended as a partial and not a full payment of the claim. *Id.*

See also, Pleading, 3.

ACKNOWLEDGMENT.

1. An officer who is financially or beneficially interested in the transaction is incompetent to take and certify the acknowledgment to an instrument. *Boswell v. First National Bank*, 161.
2. The interest of a stockholder in a corporation disqualifies him to take an acknowledgment where the corporation is a party to the instrument. *Id.*
3. Where the disqualifying interest of the officer taking an acknowledgment does not appear on the face of the instrument or certificate, and a defective acknowledgment would not invalidate the instrument between the parties

ACKNOWLEDGMENT—*Continued.*

to it, the recording thereof in the proper office operates as constructive notice to subsequent purchasers and others chargeable with record notice. *Id.*

4. A certificate of acknowledgment to an instrument reciting that the party acknowledged it to be "his free and voluntary act for the uses and purposes therein set forth" is sufficient, without adding the words "and deed" after the word "act." *Id.*
5. Section 2752, Revised Statutes 1899, declaring the form of acknowledgment therein set out to be sufficient, does not make its use imperative. *Id.*
6. Under the statute providing that an officer taking an acknowledgment shall indorse upon the instrument a certificate of the acknowledgment thereof and the true date of making the same, a certificate is sufficient stating: "Personally came before me (maker's name), whose name is subscribed to the within instrument, and acknowledged same free and voluntary." *Id.*
7. Though the statute requires the true date of making an acknowledgment to be stated in the certificate, it is sufficient if the date appears by evidence within the instrument itself. *Id.*
8. A certificate of acknowledgment is entitled to a liberal construction, and where an omission can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be sufficient. *Id.*
9. An instrument appearing to have been made and executed July 17, 1891, and acknowledged by one of the makers July 21, 1891, it is proper to presume that the acknowledgment of the other maker was made in the same month and year, which is certified as having occurred "this 29th day of July," as against an objection on the ground of an omission of the date. *Id.*

See also Deeds 1, 2.

ACTIONS.

1. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief. *Field et al. v. Leiter et al.*, 1.

See also Municipal Corporations, 1; Partition, 6, 7; Replevin.

AGENCY. See Chattel Mortgage, 1; Power of Attorney, 1; Principal and Agent.

ALIMONY. See Divorce.

AMENDMENTS.

1. There being no statute specially regulating amendments in proceedings in error, the matter of such amendments should by analogy be determined as near as may be according to the provisions of the civil code with reference to amendments of pleadings and proceedings in district courts. *Riordan et al. v. Horton et al.*, 363.
2. By analogy to the provisions of the civil code forbidding an amendment of a pleading changing substantially the cause of action, an amendment of a petition in error by substituting a different judgment for the one originally complained of should not be permitted. *Id.*
3. The judgment complained of being erroneously referred to in the petition in error as rendered at the "March term," but being otherwise sufficiently identified, and the record disclosing but one judgment which was rendered November 20, 1905, and a motion for new trial which was submitted and decided at the following March term of the trial court, it is proper to permit an amendment by inserting the true date and term of the judgment. *Id.*
4. The period having elapsed within which an original petition in error could be filed, an amendment is not permissible substituting as a ground of error the overruling of the motion of plaintiffs in error for a new trial in place of an allegation "that the court erred in overruling the motion of plaintiffs in error in said cause." *Id.*

See also Appeal and Error, 25; Carriers, 15.

ANIMALS.

1. The statute providing for the inspection of sheep and the quarantine of such animals as are infected with or have been exposed to an infectious or contagious disease is essentially a police regulation, and the power thereby conferred upon sheep inspectors is therefore not inhibited by the constitution. *Richter v. State*, 437.
2. The sheep inspector is the agent of the state for the enforcement by inspection and quarantine in authorized cases of the police regulations relating to sheep. *Id.*

ANIMALS—*Continued.*

3. The power conferred upon sheep inspectors to inspect and quarantine sheep cannot be used arbitrarily or oppressively, but only in the cases and in the manner provided by statute, which, being penal in its nature, must be strictly construed. *Id.*
4. The authority of the sheep inspector to declare and establish a quarantine for sheep rests upon the fact that they are either infected with or have been exposed to a contagious disease mentioned in or covered by the statute. *Id.*
5. The mere fact that certain sheep are suspected of being infected with an infectious or contagious disease does not authorize an inspector to quarantine them, but only to inspect them, and the authority to quarantine then depends upon the result of such inspection, and exists only when such sheep are found to be infected, or to have been exposed to an infectious or contagious disease. *Id.*
6. The acts of a lawful sheep inspector beyond and outside the authority reposed in him by statute are void. He acts summarily, and is authorized to quarantine sheep only when a cause provided therefor by statute exists. *Id.*
7. In a prosecution under the statute for removing sheep beyond quarantine limits established by an inspector for such sheep the defendant is not precluded from showing that the necessity for the quarantine did not exist, nor is he required to go into that question until the state has made out a prima facie case. *Id.*
8. In such a prosecution the inspector is not the sole judge as to whether the sheep had been exposed to disease when that was the alleged cause of the quarantine, but the question is one for the jury. *Id.*
9. Instructions to the effect that the inspector is the sole judge as to whether the sheep alleged to have been removed beyond quarantine limits had been exposed so as to justify their quarantine, and that the inspector had power to quarantine sheep which were suspected of being infected with an infectious or contagious disease, held to be prejudicial and reversible error. *Id.*
10. In order to convict a defendant upon the charge of removing sheep from quarantine limits established for them by an inspector, it is necessary for the prosecution to show by competent evidence that the sheep were either infected or had been exposed to an infectious or contagious disease mentioned or covered by the statute. *Id.*

See also Carriers.

APPEAL AND ERROR.

1. The death of a plaintiff in error subsequent to the filing of the petition and issuance of summons in error does not abate the proceeding. *Field et al. v. Leiter et al.*, 1.
2. Upon the suggestion of the death of a plaintiff in error who was such in his capacity as trustee, the substitution of his successor in trust is proper with the same rights, liabilities and purposes as his predecessor. *Id.*
3. An order denying a change of venue cannot be reviewed in the absence of a bill of exceptions containing the motion and affidavit in support thereof. *Littleton et al. v. Burgess*, 58.
4. That counsel for plaintiff in error, who had completed his brief two days before the expiration of the time for filing and serving same, was unable to find opposing counsel at their office to serve them with a copy until the last day is not a sufficient excuse to avoid dismissal under the rule for a failure to file the brief within the prescribed time. *Small v. Johnson Co. Savings Bank*, 126.
5. The failure of plaintiff in error to either file or serve his brief within the time required by the rules is a ground for dismissal upon motion of defendant in error. *Id.*
6. An order in a proceeding to punish an injunction defendant as for a contempt for an alleged disobedience of a temporary restraining order, which adjudges him guilty and imposes a penalty, is a final order in a special proceeding, and as such subject to review on error. *Porter v. State*, 131.
7. Though the inability of a plaintiff in error to have the record made up, through the neglect of the district court stenographer to transcribe the evidence, might have been good cause for an extension of time for filing brief, it will not excuse several months' delay in filing the same beyond the time prescribed by the rules, without an extension of time or an application therefor. *Krause v. Matthews*, 140.
8. The original papers and transcript of journal entries in another case between the same parties, not appearing to be a part of the record in the case sought to be reviewed, are improperly sent up and will be stricken from the files and returned. *Union Stock Yards National Bank v. Maika et al.*, 141.
9. An objection on the trial that the proof fails to show inability to obtain the testimony of the attesting witness

APPEAL AND ERROR—*Continued.*

- to an offered instrument or proof of their handwriting does not reach the sufficiency of the proof of the genuineness of the maker's signature, so as to entitle an objection on the latter ground to be considered on error. *Boswell v. First National Bank*, 161.
10. An objection to the form of the attestation by subscribing witnesses to an offered instrument not made on the trial is not entitled to consideration on error. *Id.*
 11. Upon exceptions of the prosecuting attorney to the refusal of requested instructions in a criminal case, where the evidence is not in the record, the only question to be determined is whether the instructions should have been given under any provable state of facts in the case. *State v. Pressler*, 214.
 12. Upon exceptions of the prosecuting attorney to the refusal of requested instructions, where the evidence is not in the record, but it appears that the court instructed on its own motion upon the question involved, it is proper to assume that there was evidence authorizing an instruction upon the point. *Id.*
 13. The failure to properly arrange and number the pages of the record is not ground for dismissal until after the non-compliance with an order of court requiring re-arrangement or numbering. *Greenawalt et al. v. Natrona Improvement Company*, 226.
 14. An order sustaining a demurrer to the petition of an intervenor, the petition having been filed by permission of the court, is not a judgment or final order from which an appeal will lie. *Id.*
 15. A joint assignment of error not good as to all joining therein cannot be sustained as to any. *Id.*
 16. A party's individual rights may be preserved upon a several or joint assignment of error, but, if the error be jointly assigned, the relief, if any, is also joint, and, if each party so joining is not entitled to the relief, the assignment must be overruled. *Id.*
 17. Errors jointly assigned in a joint petition in error complaining of a judgment against one of such parties only cannot be sustained as to any of the parties. *Id.*
 18. A judgment against the plaintiff alone was complained of by a petition in error filed by him jointly with an inter-

APPEAL, AND ERROR—*Continued.*

- venor, to whose petition, filed by the court's permission, a demurrer had been sustained, but against whom no judgment had been rendered; and the errors were jointly assigned. *Held*, that since there was no right of appeal in the intervenor, and the assignments of error were joint, the judgment must be affirmed. *Id.*
19. Error assigned upon the overruling of a motion to instruct the jury to return a verdict for the defendant in a criminal case when the state rested its case cannot be considered when the record fails to show an exception to the ruling. *Ross v. State*, 285.
 20. The competency of a particular witness is not presented where the only question upon the evidence discussed in counsel's brief is its sufficiency and weight. *Id.*
 21. Where a question as to the competency of a witness for the other party was not presented or referred to in the brief of counsel, it is not properly raised for the first time on petition for rehearing. *Id.*
 22. Alleged incompetency of a witness for the other party cannot be considered on error where it was not assigned as a ground in the motion for new trial, nor assigned as error. *Id.*
 23. A special finding of the jury in connection with a general verdict will not be disturbed on error on the ground that it is not supported by the evidence, where the evidence upon the point is conflicting. *Chicago, Burlington & Quincy Railroad Company v. Morris*, 308.
 24. A ground for new trial stated in the motion as "errors of law occurring at the trial" is too general and indefinite to present an alleged error in excluding offered evidence. *Id.*
 25. Where an amendment to a pleading might have been allowed to correspond with the facts proven, a judgment will not be disturbed because no formal amendment was made. *Chicago, Burlington & Quincy Railroad Company v. Pollock*, 321.
 26. It is only after an order has been made requiring rearrangement and numbering, and a non-compliance with such order, that the proceeding in error may be dismissed in the discretion of the court, for a non-observance of the rules as to arranging and numbering the pages of the record. *Weidenhoft et al. v. Primm*, 340.

APPEAL AND ERROR—*Continued.*

27. The motion for new trial is properly in the record, where a copy thereof appears in the bill of exceptions, properly certified as a true bill and made part of the record, and the bill is enumerated in the clerk's certificate as one of the original papers filed in the case and transmitted to this court pursuant to the order requiring the original papers to be sent up. *Id.*
28. A final judgment of the district court in a proceeding to ascertain and determine the heirship, ownership and interest of claimants to the estate of a decedent, under Sections 4835 and 4836, Revised Statutes 1899, is reviewable on error. *Id.*
29. The provision of Section 4836, that "such determination shall be final and conclusive in the administration of the estate," does not prevent an appeal, but is to be construed as concluding the parties by a final determination in the proceeding, which, in case of an appeal, would only occur when finally decided in the appellate court. *Id.*
30. A party may assign as error one or more grounds embraced in the motion for new trial, and thereupon be entitled to have those matters reviewed, without specifically assigning as error the overruling of the motion for new trial. *Riordan et al. v. Horton et al*, 363.
31. As to all matters which must or should be embraced in a motion for new trial as a condition to their consideration on error, the statute limiting the time for bringing proceedings in error begins to run from the date of the ruling upon the motion for new trial. *Id.*
32. A question not raised in the brief of plaintiff in error will be deemed to have been waived or abandoned. *Id.*
33. Where the finding of the trial court upon a material fact is found not sustained by sufficient evidence, and the finding upon another material fact is indefinite, and the judgment is reversed on error on that ground, as well as for error in overruling the motion of the complaining party for a new trial, the proper order is one remanding the cause for a new trial. *City of Rawlins v. Jungquist*, 403.

See also Amendments; Appeals from Justice Court; Divorce, 1, 2.

APPEAL BOND. See Appeals from Justice Court, 4, 5.

APPEALS FROM JUSTICE COURT.

1. An order of the district court is necessary to dismiss a perfected appeal from justice court. *Mayott et al. v. Knott*, 108.
2. An appellant cannot dismiss his perfected appeal from justice court by a mere entry of dismissal upon the docket of the district court. *Id.*
3. The act of appellant in entering upon the docket a dismissal of his appeal from justice court does not divest the district court of jurisdiction to try the case *de novo*. *Id.*
4. One who signs as surety an undertaking for costs and stay of execution on an appeal from justice court assumes the obligations imposed by the statute authorizing it. *Id.*
5. Upon a trial *de novo* in the district court of a case appealed from a justice of the peace, a judgment against the appellant is properly rendered against him and his sureties in the undertaking to stay execution, in accordance with the statute authorizing that procedure. *Id.*

APPORTIONMENT. Legislative, see Legislature.

ASSAULT. See Assault with Intent to Commit Rape.

ASSAULT WITH INTENT TO COMMIT RAPE.

1. In a prosecution for an assault upon a female child under the age of consent with intent to commit rape, an instruction is not objectionable as defining a crime unknown to the statute which states that an attempt of a man to carnally know a female child under the age of six years would be an attempt to commit a violent injury to such child as alleged in the information, since it does not purport to describe a complete crime, but merely one of the elements of assault as charged in the information. *Ross v. State*, 285.
2. To have carnal knowledge of a female under the statutory age of consent is rude, as well as unlawful, and within the contemplation of the statute defining assault, constitutes a violent injury. *Id.*
3. An information alleged that defendant "did unlawfully and feloniously attempt to commit a violent injury on the person of (name), a female child under the age of 18 years, he, the said (defendant), having then and there the present ability so to do, with intent then and there to ravish and carnally know the said (child)." *Held*, (1) a statutory

ASSAULT WITH INTENT TO COMMIT RAPE—*Continued.*

assault is alleged. (2) An assault being alleged in the language of the statute, coupled with an averment of the specific felonious intent, the information is good for assault with intent to commit rape. *Id.*

4. Since the word "ravish" does not occur in the statutory definition of rape, its use is not necessary in an indictment or information charging that crime under the statute, and when used it may be treated as surplusage. *Id.*
5. In an information charging an unlawful and felonious assault with intent to ravish and carnally know a female child under the statutory age of consent, the word "ravish," as presupposing force in the assault, may be treated as surplusage, since the intent, in such case, will be felonious whether the accused contemplated resistance on the part of the female or not. *Id.*
6. Carnal knowledge of a female under the statutory age of consent, as well as at common law when the female is under the age of ten years, is conclusively presumed to have been accompanied with force and against consent. *Id.*
7. Since, by statute, a female under the age of eighteen years is legally incapable of consenting to carnal knowledge of her person, she is incapable of consenting to an assault upon her with intent to commit rape. *Id.*
8. Upon a charge of assault with intent to commit rape upon a female under the statutory age of consent, it is immaterial whether she consented to the act constituting the assault or resisted. *Id.*
9. Physical resistance, as implied in an assault, is not a necessary element in an assault with intent to commit rape upon a female under the statutory age of consent, as, under the statute, she has no legal capacity to consent to the act of carnal knowledge, and every act done in furtherance of a purpose to know her carnally is unlawful and felonious, and, if such acts would constitute an assault if done without her consent, no act of hers can waive the assault. *Id.*
10. In a prosecution for assault with intent to commit rape upon a female under the statutory age of consent, an instruction was properly refused which required that, in order to convict, the jury should be satisfied that the intent of the accused was to have carnal knowledge of the child's person at all events and notwithstanding any resistance on her part. *Id.*

ASSAULT WITH INTENT TO COMMIT RAPE—Continued.

11. The evidence showing that defendant was either guilty of assault with intent to commit rape as charged, or not guilty, and simple assault was not proven, nor assault and battery charged, it was not error to refuse an instruction that the jury might find the defendant guilty of assault, if not satisfied that the assault was committed with the felonious intent to commit rape. *Id.*
12. The evidence in a prosecution for assault with intent to commit rape upon a girl six years of age held sufficient to justify a conviction. *Id.*

ASYLUMS. See Insane Asylum.

ATTORNEY IN FACT. To execute Chattel Mortgage, see Chattel Mortgage, 1.

ATTORNEY FEES. What recoverable in suit on Injunction Bond, see Injunctions, 3, 4.

BILL OF EXCEPTIONS. See Appeal and Error, 27.

BILLS AND NOTES. See Building and Loan Associations, 3, 4.

BOND. On appeal from justice court, see Appeals from Justice Court, 4, 5. For injunction, see Injunctions. In replevin, see Replevin, 9, 11, 13.

BRIEFS. See Appeal and Error, 4, 5, 7.

BROKERS. See Principal and Agent, 1-4; Vendor and Purchaser, 1.

BUILDING AND LOAN ASSOCIATIONS.

1. Where the by-laws of a mutual building and loan association provide that its stock is to be matured by the equal application to all of it, or all of a series, of the monthly dues and profits, and that it will mature whenever the amount to its credit shall equal its par value, a mere estimate of the time which will be required to mature the stock plainly stated as an estimate in the by-laws and printed circulars of the association, does not bind the association to mature its stock within the estimated period, or limit the period for the payment of dues. *Clause, Administrator, etc. v. Columbia Building and Loan Association*, 450.
2. The by-laws provided that stock should mature whenever by the equal application thereto of the monthly dues and profits the amount to its credit should equal its par value, that shareholders not obtaining loans should pay monthly a stated sum on each share, and that borrowing share-

BUILDING AND LOAN ASSOCIATIONS—*Continued.*

holders should pay monthly "until the stock borrowed upon shall have matured and the loan is thereby repaid" one seventy-second of the sum borrowed (less the membership fee) also interest at the rate of three per cent per annum upon the original amount of the loan. *Held*, that the section relating to payments by borrowing shareholders is not to be construed as providing for liquidating the indebtedness with 72 monthly payments or for merely three per cent interest on the loan, but for a continuance of the required monthly payments until the maturity of the stock; that the interest to be paid for the use of the money advanced is that portion of the monthly payment in excess of the regular stock dues; and, therefore, that the obligation of a borrower under his contract to make the stated monthly payment until the stock borrowed upon shall have matured and the loan is thereby repaid is not terminated upon making the payments for a period of 72 months, unless the stock has matured. *Id.*

3. A shareholder of a mutual building and loan association, upon receiving a loan equal to the par value of his shares, executed a note or contract acknowledging the loan and providing for the monthly payment of a stated sum "until the stock borrowed upon shall have matured in accordance with the by-laws and rules of said association, and this loan is thereby repaid," and made the required payments for six years, a period originally estimated in the by-laws and circulars of the association to be sufficient to mature the stock. No further payments being made, the association several years later sued to recover a sum alleged to be due upon the note. *Held*, that the plaintiff to maintain its right of recovery was bound to prove that the stock had not matured, since otherwise no default could be established. *Id.*
4. The plaintiff association having alleged in its petition in such suit the value of the stock at the time of bringing suit and a willingness to credit the value upon the amount found to be due, and the answer, without objecting to such credit, having denied that the value was only that stated in the petition, and alleged that the stock had or ought to have matured and therefore there was no indebtedness, the defendant shareholder should be allowed the value of the stock with interest in reduction of any amount found to be due upon the debt. *Id.*

See also Limitation of Actions, 11.

BURDEN OF PROOF. See Accord and Satisfaction, 1; Criminal Law, 2; Evidence, 8; Mandamus, 19, 22.

CARRIERS.

1. It is incumbent upon a railroad company as a carrier of live stock to furnish a car properly equipped to safely transport the animals to their destination, and it will be liable for injuries resulting from a failure in that respect. *Chicago, Burlington & Quincy Railroad Company v. Morris*, 308.
2. The failure of a shipper of live stock to inspect the car furnished by the carrier for their transportation will not relieve the carrier from liability for injuries to the animals resulting from a defect in the car so furnished, since it is not the duty of the shipper to make such inspection. *Id.*
3. In an action for injuries to live stock during transportation by a railroad company, delay in reaching an unloading point was material as bearing upon the question of proper equipment to handle the train and transport the animals with reasonable dispatch to where they could be unloaded and cared for. *Id.*
4. While it is not every delay that entitles a shipper of live stock to damages for injuries sustained by the animals during transportation, a delay caused by the negligence of the carrier and contributing to the injuries will constitute a proximate cause, and support an action for damages. *Id.*
5. The overloading of an engine, or a defective engine, which causes a delay, is evidence of negligence, and where such negligence contributes to the injury, damages are recoverable. *Id.*
6. Whether the negligence of the carrier of live stock in furnishing a defective car and delay in transit constituted the proximate cause of injuries sustained by some of the animals during transportation by getting down and being trampled upon is a question for the jury. *Id.*
7. The rights, duties and obligations created by a shipping contract are questions of law to be determined by the court. *Id.*
8. Where a shipment is under the terms of an express contract between shipper and carrier, the rights of the parties must be measured thereby. *Id.*
9. A shipment of horses having been made under an express written contract between the shipper and carrier, whether

CARRIERS—*Continued.*

- it was the duty of the shipper to go with the horses, or have someone do so, was a question of law, and improper to be submitted to the jury for a special finding. *Id.*
10. Where an interrogatory for special finding in connection with a general verdict is improperly submitted because involving a question of law and not of fact, an answer thereto by the jury that there is no evidence upon it cannot be regarded as prejudicial. *Id.*
 11. Where, in connection with a general verdict against the carrier, in an action for injuries to horses during transportation, the jury returned a special finding that the injuries were caused by a damaged car and delayed train; *Held*, that under the verdict and finding the failure of the shipper to accompany the horses, or send someone with them, to care for them, as provided in the shipping contract, did not contribute to, and was not the proximate cause of the injuries. *Id.*
 12. Though a carrier is not liable for injuries to animals during transportation resulting solely from their vices and natural propensities, to constitute a defense on that ground it must appear that such vices and natural propensities, either alone or in conjunction with some innocent cause, was the proximate cause of the injuries, and the burden is on the carrier to show that fact. *Id.*
 13. A railroad company is liable as a carrier of live stock for the loss of an animal from its car, caused by its negligence in failing to furnish a car provided with a secure and safe door to prevent the stock from falling out or escaping. *Id.*
 14. Damages assessed by the jury for injuries to live stock during transportation by a common carrier are not excessive when within the evidence and not exceeding the value placed upon the animals in the contract of shipment as a limitation upon the amount of recovery. *Id.*
 15. Recovery being sought for an alleged failure of a carrier to transport two out of a number of horses alleged to have been delivered, the petition alleged that the defendant, through a named employee, loaded the horses upon defendant's cars. *Held*, that such averment would not prevent a recovery for a loss of the horses between the time of delivery and loading, it appearing from the evidence that defendant was not misled, and the petition, if its interpreta-

CARRIERS—*Continued.*

tion was doubtful, might have been amended to conform to the facts. *Chicago, Burlington & Quincy Railroad Company v. Pollock*, 321.

16. The liability of a carrier as such commenced at the time of delivery and acceptance of the property for shipment. *Id.*
17. By the acceptance on the part of defendant carrier of a delivery for transportation of plaintiff's horses, then in a pen of defendant's stock yards, the latter became liable from that time as carrier, notwithstanding that prior to such delivery plaintiff's horses were held in the pen subject to his personal control, under an arrangement with a third party having the temporary use of the yards for a public horse sale. *Id.*
18. Though the plaintiff had for a time been using a pen in the stock yards of defendant carrier for holding his horses, with personal control over them, neither he nor the carrier was prevented by that fact from changing the situation, and entering into an arrangement for the delivery in the same pen of the horses for transportation. Whether such a change was accomplished was a question of fact for the jury. *Id.*
19. Where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in the performance of the act, notwithstanding a stipulation in the contract of shipment requiring the loading to be done by the shipper. *Id.*
20. It is the province of the jury to pass upon conflicting evidence as to the number of horses delivered to a carrier for shipment, and the credibility of witnesses is especially a matter for their consideration. *Id.*

CHANGE OF VENUE. See Appeal and Error, 3; Jurisdiction, 1; Prohibition, 2.

CHATTEL MORTGAGE.

1. Under the statute declaring it necessary for each member of a partnership to execute and acknowledge a chattel mortgage of firm property, a partner, if under no legal disability, may, by a duly executed power of attorney, appoint an attorney in fact to act for him and in his name in the execution and acknowledgment of such an instrument; and a co-partner may be so appointed. *Boswell v. First National Bank*, 161.

CHATTEL MORTGAGE—*Continued.*

2. Where a chattel mortgage, valid between the parties without acknowledgment, appears on its face to have been properly acknowledged, the record thereof is notice to subsequent purchasers, notwithstanding that the acknowledgment was taken before a stockholder of the mortgagee, a corporation, that fact not appearing by the instrument or certificate of acknowledgment. *Id.*
3. The fact that an affidavit in renewal of a chattel mortgage was sworn to by an officer of the mortgagee, a corporation, before a stockholder does not prevent its operation as constructive notice, where it does not disclose on its face the interest of the officer who administered and certified to the oath. (But whether a stockholder would be disqualified to certify to such an affidavit is not decided.) *Id.*
4. A firm debt represented by an accommodation note of a third party to the firm indorsed and guaranteed by the latter to the mortgagee is properly secured by a chattel mortgage of partnership property. *Id.*
5. The filing of a chattel mortgage pursuant to statute is a substitute for the transfer of possession; and the filing of a renewal affidavit has the same effect after maturity. *Id.*
6. Where, as provided by statute, a chattel mortgage is filed, and continued in force by the filing of renewal affidavits, the mortgagee is not required to take possession of the property upon maturity of the mortgage debt, to preserve the priority of the mortgage lien, and protect his rights against a charge of fraud. *Id.*
7. Part of the consideration of a partnership chattel mortgage was money advanced upon the credit and note of the firm, to satisfy the indebtedness of another party represented by one firm note and three smaller notes of one of the partners, and the purchase price of certain cattle, the bill of sale having been dated the day following the execution of the mortgage and made out in the name of said individual partner and handed by the seller to the mortgagee; it appeared by uncontradicted testimony that the said partner's individual notes had been given for money borrowed for and on account of the firm, of which he was the managing and resident partner, and that the cattle were purchased by said partner for the firm, who had possession thereof, before the payment of the price and the execution of the

CHATTEL MORTGAGE—Continued.

mortgage. It did not appear that the said partner directed or knew the bill of sale to be made out in his name. *Held*, (1) that the money was advanced for partnership indebtedness, and was properly secured by the partnership mortgage. (2) That the cattle aforesaid were properly mortgaged as firm property. (3) The question was one of law upon the undisputed facts whether the mortgage attempted to secure a partner's individual debt instead of a debt of the partnership, and in that respect a verdict was properly directed for the plaintiff mortgagee. *Id.*

See also Power of Attorney, 1; Replevin, 4.

CONFLICT OF LAWS. See Limitation of Actions, 2.

CONSIDERATION. See Chattel Mortgage, 7.

CONSTITUTION.

1. The constitution of the State of Wyoming, adopted and ratified at an election held in November, 1889, went into effect upon the approval of the act of admission, July 10, 1890. *State ex rel. Sullivan et al. v. Schnitger, Secretary of State*, 479.

CONSTITUTION, CITED OR CONSTRUED.

	<i>Page</i>
Art. I, Sec. 2, Declaration of Rights.....	263
Art. I, Sec. 6.....	447
Art. III, Sec. 3, Legislative Department.....	507, 512
Art. III, Secs. 2, 3, Legislative Department.....	501
Art. III, Sub. Tit. Apportionment, Sec. 2.....	501
Art. III, Sub. Tit. Apportionment, Sec. 4.....	502, 504, 510
Art. V, Secs. 2, 3, Supreme Court, Jurisdiction.....	400
Art. V, Sec. 3, Supreme Court, Original Jurisdiction...	237, 245
Art. V, Sec. 10, District Court, Jurisdiction.....	245
Art. XII, Sec. 1, County Organization.....	537
Art. XII, Sec. 2, County Organization.....	538
Art. XXI, Sec. 7, Schedule.....	505, 507
Art. XXI, Sec. 18, Schedule.....	506, 511
Art. XXI, Secs. 21, 22, Schedule.....	537

CONSTITUTIONAL LAW. See Animals, 1; Habeas Corpus, 3; Provisions for Legislative Apportionment, see Legislature.

CONTEMPT. See Costs, 1; Injunction, 8-14.

CONTRACTS. See Building and Loan Associations; Carriers, 7-9; Principal and Agent, 2-4; Vendor and Purchaser, 1.

CONVEYANCE. See Acknowledgment, 1-3; Chattel Mortgage, 2, 3; Deeds; Evidence, 1-7; Power of Attorney, 1.

CORONER. See Writ and Process, 2.

CORPORATIONS. See Acknowledgment, 2; Building and Loan Associations.

COSTS.

1. A defendant adjudged guilty of contempt for disobedience of an injunction cannot be imprisoned for non-payment of the costs of the contempt proceeding, in the absence of a statute expressly authorizing it. *Porter v. State*, 131.

See also Injunction, 13, 14.

COUNTIES. As legislative districts, see Legislature, 1-3.

CRIMINAL LAW.

1. An objection that a defendant in a criminal case was not given a preliminary examination must be presented by a motion to quash if the facts appear on the record, otherwise by plea in abatement, and, if not so presented, is waived by a plea of not guilty. *McGinnis v. State*, 72.
2. An instruction in a homicide case approved to the effect that the presumption of defendant's sanity stands until overcome by the evidence coming either from the state or defense; that upon all the evidence the burden is on the state to prove beyond a reasonable doubt everything essential to constitute the crime, including the sanity of the defendant; and that if the jury, upon all the evidence, have a reasonable doubt whether the defendant was legally capable of committing the crime, it is their duty to acquit. *State v. Pressler*, 214.
3. Where elements not existing in the similar common law offense are contained in the statutory definition of a crime, the courts are not bound in construing the statute by the construction which obtained with reference to the common law offense. *Ross v. State*, 285.
4. When the evidence on a criminal trial shows the accused to be either guilty of the higher grade of the offense charged, or not guilty, the court is not required to instruct upon the lower grades. *Id.*
5. Whether an assault was committed with the felonious intent charged in an indictment or information is to be determined by the jury upon a consideration of all the facts and surrounding circumstances as disclosed by the evidence. *Id.*

CRIMINAL LAW—Continued.

6. The same offense is charged in two informations for murder against the same defendant, although in the second he is charged jointly with another, where both informations charge the same degree of crime, and the killing of the same person at the same time and place. *Keefe et al. v. District Court of Carbon County*, 381.
7. The statute requiring the prosecuting attorney to elect upon which of two or more indictments against the same defendant for the same criminal act he will proceed (*R. S. 1899, Sec. 5300*) refers to indictments pending in the same court and one having jurisdiction to proceed on either. *Id.*

For prosecution of violation of quarantine laws, see *Animals*, 7-10.

See also *Assault with Intent to Commit Rape*; *Evidence*, 8; *Habeas Corpus*, 6-12; *Homicide*; *Indictment and Information*; *Jurisdiction*, 1; *Jury*, 1-3; *Prohibition*, 2; *Robbery*.

DAMAGES. See *Carriers*, 14; *Ejectment*, 1.

DEEDS.

1. Where the statute requires the deed of a public officer to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging in that manner is a part of the execution of the deed, and unless so witnessed or acknowledged it is void on its face. *Matthews v. Blake*, 116.
2. A tax deed not acknowledged before the clerk of the district court as required by statute is void on its face, and is therefore not admissible as evidence to prove title or right of possession in the grantee, or that the land had been sold for non-payment of taxes. *Id.*

See also *Acknowledgment*.

DEMURRER. See *Limitation of Actions*, 3; *Parties*, 3.

DIRECTING VERDICT. See *Chattel Mortgage*, 7; *Trial*, 1.

DIVORCE.

1. In a proceeding in error to review a judgment denying a divorce to a wife in her suit therefor, the supreme court, in the exercise of its appellate jurisdiction, may require the husband, defendant in error, to pay a reasonable amount to enable the wife to prosecute her appeal and for the

DIVORCE—Continued.

support of herself and child during the pendency thereof.
Duxstad v. Duxstad, 396.

2. Such relief in an appellate court is not a matter of course, but can be granted only upon a showing of the necessities of the wife, the financial ability of the husband, and that the appeal is taken in good faith. *Id.*

EJECTMENT.

1. Where, in a suit by a vendee against one wrongfully in possession, the former shows a legal right to possession from the completion of his purchase, he is entitled to recover rents and profits from that time, though it covered a period before he had received his deed. *Brown et al. v. Grady*, 151.

See also, Occupying Claimant, 1.

ESTATES OF DECEDENTS.

1. An executor's possession of real estate does not prevent the heir or devisee from suing another tenant in common for partition. *Field et al. v. Leiter et al.*, 1.

See also, Appeal and Error, 28, 29; Evidence, 9.

EVIDENCE.

1. By the strict rule of the common law the primary or best evidence of the execution of a deed or other private writing having a subscribing witness is generally the testimony of such witness, if available, or, if not, proof of his handwriting, if that be feasible; if neither be attainable, it is then competent and sufficient to prove the signature of the grantor or maker. *Boswell v. First National Bank*, 161.
2. Where an attesting witness to an instrument is not within the jurisdiction of the court, he is to be regarded as unavailable, and proof of that fact lets in secondary evidence of execution. *Id.*
3. Where the execution and attestation of an instrument occurred out of the jurisdiction, it is to be presumed, in the absence of contrary evidence, that the subscribing witness is out of the jurisdiction at the time of the trial, and that proof of his handwriting is not attainable. *Id.*
4. Because of the presumption where execution and attestation of an instrument occurred out of the jurisdiction, it is not, in such case, incumbent upon the party offering the instrument to show diligent and unsuccessful search for

EVIDENCE—*Continued.*

- proof of the handwriting of the subscribing witness, to let in proof of the maker's signature. *Id.*
- 5. Whether evidence is satisfactory respecting the absence of a subscribing witness, so as to let in secondary evidence of the execution of the instrument, is chiefly a question for the trial court, which will not be revised on error if there is any testimony tending to show the fact. *Id.*
- 6. The execution by each of two non-resident makers of a power of attorney was attested by a separate witness; the acknowledgment of each was taken out of this state and in the state where he resided; it was testified by a witness that one subscribing witness had resided at the same place as the party whose execution he had attested, and that he supposed the other resided where the party did whose execution was attested. *Held*, that the showing of execution and attestation out of the jurisdiction was sufficient, and there being no evidence to indicate that the attesting witness then or had ever resided in the jurisdiction, the presumption that they were unavailable as well as proof of their handwriting followed, and proof of the signatures of the parties to the instrument became admissible. *Id.*
- 7. An objection on the trial that the proof fails to show inability to obtain the testimony of the attesting witness to an offered instrument or proof of their handwriting does not reach the sufficiency of the proof of the genuineness of the maker's signature, so as to entitle an objection on the latter ground to be considered on error. *Id.*
- 8. The presumption that all men are sane and capable of understanding the nature and consequences of their acts, until the contrary is shown, is a rule of evidence applicable to criminal prosecutions, and it has the force of evidence sufficient, if uncontradicted, to establish the sanity of the defendant. When, however, the right to a conviction is challenged by evidence tending to show defendant's insanity, the burden of proof does not shift, but still rests upon the prosecution to show that the defendant was criminally responsible. *State v. Pressler*, 214.
- 9. One claiming to be the widow of a decedent is not a competent witness to prove marriage as against the mother and sister of decedent claiming as heirs, in a proceeding to determine the heirship to decedent's estate; but her testimony is competent where she is allowed to testify without

EVIDENCE—Continued.

objection, though in determining its weight the fact that the statute makes her an incompetent witness should be considered. *Weidenhoft et al. v. Primm*, 340.

10. Judicial notice will be taken of the organization of the counties of the state. *State ex rel. Sullivan et al. v. Schnitger, Secretary of State*, 479.
11. The population of the state as determined by authority of law is a matter of legislative as well as judicial knowledge. *Id.*
12. The court takes judicial notice of the membership of the legislature and the terms of the senators as the senate is presently constituted, and the journal of either branch of the legislature in so far as it is germane to and bears upon the question involved. *Id.*

See also, *Marriage*, 4.

EXCEPTIONS. See *Appeal and Error*, 11, 12, 19.

EXECUTION. Proceedings in Aid of, See *Judicial Sales*, 1.

FINAL ORDER. See *Appeal and Error*, 6, 14, 28, 29.

FINDINGS. See *Special Findings*.

FORMER JEOPARDY. See *Habeas Corpus*, 6-12; *Jury*, 3.

FRAUD. See *Trial*, 4.

HABEAS CORPUS.

1. A person unlawfully restrained of his liberty as an insane person is entitled to a writ of habeas corpus upon proper application. *Byers v. Solier, Superintendent &c.*, 232.
2. The courts and judges thereof are not divested of their jurisdiction in habeas corpus by Sections 4894 and 4895, Revised Statutes 1899, which provide a proceeding in the court of original commitment for a hearing before a jury as to whether one previously declared to be of unsound mind has recovered. *Id.*
3. A person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty. *Id.*
4. A writ of habeas corpus does not possess the functions of a writ of error or other proceeding for the review and correction of errors. *Hovey v. Sheffner, Sheriff*, 256.

HABEAS CORPUS—*Continued.*

5. In a habeas corpus proceeding by a prisoner pending a prosecution for a criminal offense, the court is not concerned with mere errors of law not affecting the jurisdiction of the committing court to make the order under which the petitioner is held. *Id.*
6. On a habeas corpus proceeding brought by a prisoner committed for a second trial after an alleged void discharge of the jury at the former trial without a verdict, it is not material whether the discharge of the jury was a void act or not, unless it divested the court of jurisdiction to proceed further in the cause. *Id.*
7. The strictly appellate or revisory jurisdiction of the supreme court is not invoked through the institution therein of an original proceeding by a petition for habeas corpus, whether the writ be allowed by the court, or a justice thereof, and made returnable before the court. *Id.*
8. The occurrence of mere errors or irregularities in a criminal case not affecting the trial court's jurisdiction will not authorize a discharge of the accused on habeas corpus. *Id.*
9. The jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject matter, and of the person, but as well to jurisdiction to render the particular judgment. *Id.*
10. As a general rule the defense of former jeopardy or former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus. *Id.*
11. Though an improper discharge of the jury after jeopardy begun may operate in law as an acquittal, habeas corpus will not lie on that ground for the prisoner's discharge. *Id.*
12. The district court is not divested of further jurisdiction in a criminal case, or of jurisdiction to commit the accused to await another trial, so as to authorize the prisoner's release upon habeas corpus, by a discharge of the jury for disagreement on Sunday, though the act in so discharging the jury be void because occurring on a non-judicial day, thereby giving to the accused the defense of former jeopardy or acquittal to a further prosecution. *Id.*

HOMICIDE.

1. Instructions in a homicide case to the effect that the burden is upon the defendant to overcome the legal presumption of his sanity by a preponderance of the evidence is held to have been properly refused. *State v. Pressler*, 214.

HOSPITAL FOR THE INSANE. See Insane Asylum.

HUSBAND AND WIFE. See Marriage.

INDICTMENT AND INFORMATION.

1. Only when the statute defining an offense fully, directly and expressly, without any uncertainty or ambiguity, sets forth all the elements necessary to constitute the offense intended to be punished, and states all the material facts and circumstances embraced in the definition of the offense, is it sufficient for an indictment or information to charge the offense in the language of the statute. Ingredients not entering into the statutory definition must be alleged. *McGinnis v. State*, 72.

See also, Assault with Intent to Commit Rape; Criminal Law, 1, 6, 7; Robbery, 2, 3.

INJUNCTION.

1. An injunction bond is properly executed in favor of the prosecuting attorney individually in a suit to enjoin him from prosecuting the plaintiff for an alleged offense under a criminal statute. *Littleton et al. v. Burgess*, 58.
2. A party who files a petition and bond, and procures thereby an injunction to issue from a court of general jurisdiction, cannot be heard to complain, when sued on the bond, that the court granting the injunction was without jurisdiction. *Id.*
3. Attorney fees incurred in procuring the dissolution of an injunction are recoverable as damages in a suit upon the injunction bond, though the ground of dissolution was the want of jurisdiction to grant the particular injunction, the court granting it being one of general jurisdiction. *Id.*
4. Attorney fees so incurred are recoverable though not actually paid. *Id.*
5. No relief other than injunction having been sought in the suit where a bond was given to procure a temporary restraining order, a petition in a suit upon the bond is not demurrable for failing to state separately the amount of attorney fees incurred in procuring a dissolution of the injunction and in defending the action. *Id.*
6. A demurrer does not lie to a petition in a suit upon an injunction bond for alleging that certain attorney fees had been incurred in defense of the injunction suit, and in securing a dissolution of the injunction, without specifying

INJUNCTION—*Continued.*

separately the fees incurred for procuring dissolution, but the objection should be made by motion or upon the evidence. *Id.*

7. In a suit upon an injunction bond given in favor of the prosecuting attorney individually in a cause against him to enjoin a criminal prosecution, neither the state nor the county is a necessary party plaintiff. *Id.*
8. The statute making the disobedience of an injunction a contempt is both remedial and punitive, since it not only authorizes the requirement of restitution to the injured party and further security for obedience to the injunction, but the imposition of a fine for the use of the county. *Porter v. State*, 131.
9. Without deciding that a proceeding against an injunction defendant as for a contempt in disobeying the injunction may not properly be brought and entitled on the relation of a party or in the name of the state, it is deemed better practice to entitle it in the cause out of which it arises. *Id.*
10. By voluntarily appearing, filing an answer, and submitting to a hearing without objecting to jurisdiction, upon a rule to show cause why he should not be punished as for contempt for an alleged disobedience of the injunction, an injunction defendant waives the irregularity, if any, in bringing and entitling the contempt proceeding in the name of the state as plaintiff. *Id.*
11. After such appearance it is too late for the defendant to object for the first time in the appellate court on error that the contempt proceeding was improperly brought and entitled in the name of the state. *Id.*
12. Plaintiff and defendant being adjoining land owners, the latter claimed some of his premises had been included within the former's enclosure, in which he was sustained by a survey of the county surveyor made to establish the line, on his application, pursuant to statute. By temporary restraining order the defendant was enjoined from entering upon plaintiff's premises described only by legal subdivisions without mention of an enclosure. In a proceeding to punish him as for contempt for disobeying the injunction it was not shown that he had gone upon any of the land described in plaintiff's petition or restraining order, but merely that he had entered plaintiff's enclosure. *Held*, that upon the evidence the defendant was not guilty of contempt. *Id.*

INJUNCTION—*Continued.*

13. A defendant adjudged guilty of contempt for disobedience of an injunction cannot be imprisoned for non-payment of the costs of the contempt proceedings, in the absence of a statute expressly authorizing it. *Id.*
14. The statute merely authorizing a commitment to custody for the non-payment of a fine imposed in a contempt proceeding for the disobedience of an injunction, there is no authority to imprison for the non-payment of the costs of such proceeding. *Id.*

INSANE ASYLUM.

1. With the approval, or under the direction of the state board of charities and reform, in whom is vested by statute general supervision and control of the state hospital for the insane, the proper officers of that institution have the power to discharge a recovered patient. *Byers v. Solier, Superintendent, &c., 232.*
2. In the absence of a statute to the contrary, the controlling authorities of the state hospital for the insane have the power to voluntarily release one committed thereto upon his recovery; and, in the exercise of a reasonable discretion and acting in good faith, whenever the circumstances are deemed to justify it, to release a patient not fully recovered, either unconditionally, or temporarily and upon expressed conditions. *Id.*
3. Where at the solicitation of his mother, the plaintiff, then a committed patient in the state hospital for the insane, was delivered into her custody by the superintendent of the institution, with the approval of the state board of charities and reform, and taken to her residence in another state, and an entry was made in the hospital records that plaintiff had been discharged as improved. *Held*, that the discharge was unconditional. *Id.*
4. After the unconditional discharge of a committed patient from the state hospital for the insane, by the proper officers thereof, he cannot be again legally restrained therein, against his consent, without another judicial inquiry to determine his mental condition. *Id.*
5. The authorities of the state hospital for the insane are not vested with authority to commit a person thereto, nor to confine him there against his consent, without the judicial inquiry provided by law, except one so violently or dangerously insane as to warrant his temporary confinement until the necessary proceedings can be had. *Id.*

INSANITY. For presumption and burden of proof in criminal prosecutions, see Criminal Law, 2; Evidence, 8; Homicide, 1. For commitment and discharge of insane persons, see Habeas Corpus, 1-3; Insane Asylum, 1-5.

INSTRUCTIONS. See Assault With Intent to Commit Rape, 1, 10, 11; Criminal Law, 2, 4; Homicide, 1.

INTERVENTION. See Appeal and Error, 14, 18; Partition, 14.

JUDGMENT. See Appeal from Justice Court, 5; Injunction, 13, 14; Partition, 9, 11, 14; Writ and Process, 1, 2.

JUDICIAL NOTICE. See Evidence, 10-12.

JUDICIAL SALES.

1. A purchaser of chattels from a receiver in proceedings supplementary to execution, on a sale to pay the receiver's expenses, takes subject to prior valid and subsisting liens. *Boswell v. First National Bank*, 161.

JURISDICTION.

1. The effect of a change of venue in a criminal case, after the filing of the original papers and transcript in the court to which the case has been transferred, is to invest the latter court with complete and exclusive jurisdiction to try the accused upon the information on which the change was granted for the offense therein charged, and, during the pendency of the case in that court, the court granting the change of venue has no jurisdiction to try the accused upon a second information for the same act and offense filed after the change was granted. *Keefe et al. v. District Court of Carbon Co.*, 381.

See also Appeals from Justice Court, 1-3; Divorce, 1, 2; Habeas Corpus, 2, 8-12; Writ and Process, 1, 2.

JURY.

1. Under the general rule, as well as the provisions of the constitution and statute, a trial court may, without prejudicing a further prosecution, discharge a jury in a criminal case, where it appears that, after a reasonable time for deliberation has been allowed, a verdict has not been agreed upon, and there is no probability of an agreement. *Hovey v. Sheffner, Sheriff*, 256.
2. The legal effect of an erroneous discharge of the jury in a criminal case without a verdict is neither greater nor less where the act is erroneous because void than where it is erroneous for any other reason. *Id.*
3. Whatever the particular imperfection in the discharge without a verdict of a duly sworn jury in a criminal case, its only effect in favor of the accused is to operate as a verdict

JURY—Continued.

of acquittal, thereby placing the accused within the protecting clause of the constitution against a second jeopardy. *Id.*

JUSTICE OF THE PEACE. See Appeals from Justice Court.

LEGISLATURE.

1. The constitution having declared each county a senatorial and representative district entitled to at least one senator and one representative and apportioned among the then existing organized counties, the senators and representatives to compose the legislature until an apportionment as otherwise provided by law, a newly organized county is constituted a separate senatorial and representative district by a subsequent legislative act declaring it to be such and thereupon entitled to at least the minimum representation under any general apportionment act. *State ex rel. Sullivan et al. v. Schnitger, Secretary of State, 479.*
2. Under an act entitled "An act fixing the state senatorial and representative districts and determining the legislative representation thereof" and declaring that each organized county shall constitute a separate senatorial and representative district, each county so referred to becomes a separate district, and that part of the act may stand as severable from the remainder of the act apportioning the representation, though the latter may be subject to some constitutional objection. *Id.*
3. Though not mentioned in the temporary apportionment contained in the constitution as separate senatorial and representative districts, the counties organized since the adoption of that instrument have become such by a declaration to that effect in the apportionment acts passed since their organization, and are entitled to have their representation taken into consideration and fixed in any apportionment of senators and representatives, in view especially of the constitutional provision that each county shall constitute a district. *Id.*
4. Where an apportionment act fails to express the ratios upon which senators and representatives were apportioned between the counties as separate districts, the ratios are the number of inhabitants of the state divided by the number of senators and representatives respectively. *Id.*
5. The provisions of the apportionment act of 1901 fixing ratios for the apportionment of senators and representatives upon the basis of the United States census of 1900 were re-

LEGISLATURE—*Continued.*

- pealed by the apportionment act of 1907, if the latter act is valid, since the apportionment made by the latter act is based upon a later census enumeration made under state authority in 1905, and is inconsistent with the ratio provisions of the act of 1901. *Id.*
6. Applying the natural rule as to ratio in the absence of any expressed in the apportionment act of 1907, each organized county, as a separate senatorial and representative district, was, inclusive of the minimum representation fixed by the constitution, entitled to one senator for each unit of 3771 inhabitants, and one representative for each unit of 1818 inhabitants upon the basis of 27 senators and 56 representatives provided for by the act, and these ratios should have been so applied that each of such districts, though having a population less than such units, should have the minimum representation. *Id.*
 7. The provisions of the constitution relating to legislative apportionment in connection with the provision that senators shall be elected for four years, that those first elected shall be divided into two classes, one to serve for two and the other for four years, contemplate and intend that one-half of the senators shall hold over, and that the hold-over senators shall be taken into consideration in any subsequent apportionment act. *Id.*
 8. The apportionment contained in the constitution was based upon the number of votes cast at the election last preceding the framing of that instrument, and was intended to be temporary in its application, and applicable to then existing conditions. It does not partake of that fixed and enduring character of other constitutional provisions which never yield to legislative enactment, and cannot at any time be applied so as to disturb conditions which are the legitimate outgrowth of other provisions permanent in their nature. *Id.*
 9. A valid legislative enactment superseding the temporary apportionment of senators and representatives found in the constitution is not necessary to render the latter inapplicable, but it may become so through the operation of other constitutional provisions under which the legislative department has been organized and established, and out of which conditions have arisen rendering its present application impossible without violating express and unyielding constitutional provisions. *Id.*

(19)

LEGISLATURE—*Continued.*

10. The invalidity, because unfair or inequitable and violative of the constitutional rule of apportionment, of an apportionment act does not render the legislature elected thereunder illegal, or empower the court to inquire into the qualification or right of any one to sit as a member thereof; the last and final arbiter of such question is the legislature itself, each house being the sole and exclusive judge of the election and qualification of its members, which determination is so far judicial in its nature as to make one so admitted a member, not only a member *de facto*, but *de jure* also. *Id.*
11. It being contended that the last apportionment act of 1907, and the only preceding apportionment acts of 1901 and 1893 are invalid, because inequitable and violative of the constitutional rule of apportionment as between the various counties, and that the ensuing election should be ordered to be held under the apportionment found in the constitution as the only valid one, it is *held* that, since the court is without power to question the right of any member of the legislature as presently constituted to his seat therein, or of any holdover senator to his seat in the legislature next to convene, a senator who was elected for the term of four years by authority of one of the alleged invalid acts, in a newly organized county not referred to in the apportionment found in the constitution, was admitted as a member of the senate, and whose term will not expire until after the next ensuing session of the legislature, must be treated by the court as a senator *de jure* for the full term for which he was elected and qualified; and that rule equally applies to the holdover senator from the remaining part of the old county out of whose territory the new county was created, thus rendering it necessary for the court to regard as *de jure* senators two from a territory mentioned by the name of the old county as a single district and as entitled to but one senator in the apportionment section of the constitution. *Id.*
12. By constitutional provisions, the legislature first consisted of 16 senators and 33 representatives apportioned between the then existing organized counties; each county is declared to constitute a senatorial and representative district entitled to at least one senator and one representative; senators are to be elected for four years, those first elected to be divided by lot into two classes, as nearly equal as may

LEGISLATURE—*Continued.*

be, the first to serve for two, and the second for four years. New counties were afterwards organized, in one of which, as well as in the old county from which it was taken, pursuant to an apportionment act, a senator had been elected and admitted as a member of the senate, whose term would not expire until after the next ensuing session. Holdover senators were also in office from other old counties which had been divided, in whose election the new counties had no voice; and under the apportionment contained in the constitution such new counties could not be represented except as part of the old counties respectively, since such apportionment was confined to the counties as then organized. It was sought by mandamus to compel an election under the apportionment contained in the constitution, disregarding the apportionment acts respectively of 1907, 1901, and 1893, on the ground of the alleged invalidity of each of said acts because violative of the constitutional provision that the apportionment should be made upon the basis of the last enumeration of inhabitants by authority of the state or United States, according to ratios to be fixed by law. Pursuant to the acts of 1893 and 1901 the membership of the legislature had been increased so that at the session of 1907, and when suit was brought, there were 13 holdover senators, thereby allowing the election of only 4 to complete the number apportioned by the constitution, and requiring that number to give the counties named in the constitution their declared representation. *Held*, that an election under the apportionment contained in the constitution would be illegal and ought not therefore to be compelled, since it would violate the constitutional provision for two classes of senators as nearly equal as may be, and the election of 4 senators would give the senate a membership of 17, leaving the house with 33 members, in violation of the constitutional requirement that the number of members of the house shall at no time be less than twice the number in the senate, and such election if held would further result in the representation of certain new counties by holdover senators, not residents thereof and who were not elected therefrom or from an entire district as established by the apportionment of the constitution, but by the electors of that part of the old counties respectively remaining after their division and composing a part only of the original district. *Id.*

See also Mandamus, 5.

LIENS. See Judicial Sales, 1.

LIMITATION OF ACTIONS.

1. Possession under a tax deed, void on its face, does not set in motion the special statute of limitations as to the recovery of property sold for taxes contained in Section 1861, Revised Statutes 1899. *Matthews v. Blake*, 116.
2. Statutes of limitation affect the remedy and not the cause of action, and in that respect, therefore, an action on contract is governed by the law of the forum. *Union Stock Yards Nat'l Bank v. Maika et al.*, 141.
3. When the fact that the action is barred by the statute of limitations appears on the face of the petition, the objection may be raised by demurrer. *Id.*
4. An involuntary part payment does not have the effect of arresting the running of the statute of limitations upon a demand founded on contract. *Id.*
5. The running of the statute of limitations upon a note is not arrested by the application thereon, under an order of court on foreclosure, of the proceeds of the sale of the property mortgaged to secure its payment. *Id.*
6. Where the issuance and service of a summons in an action is sufficient to confer jurisdiction over the person of the defendant the action will have been commenced, the proceeding being otherwise regular, although the service is afterwards quashed, within the meaning of the statute (Sec. 3465, R. S. 1899) providing that if in an action commenced in due time the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such failure expired, the plaintiff may commence a new action within one year after such date. *Clause, Adm'r., Etc. v. Columbia Building & Loan Ass'n.*, 450.
7. Where the service of summons by the coroner is quashed because the sheriff was improperly joined as a party defendant there is a failure by the plaintiff otherwise than upon the merits within the statute authorizing in such case where the action has been commenced in due time the commencement of a new action within one year after the date of such failure if at the date thereof the time limited for the commencement of such action has expired. *Id.*
8. Where, through the quashing of the service of summons, there has been a failure by the plaintiff otherwise than upon

LIMITATION OF ACTIONS—*Continued.*

the merits in an action commenced in due time, and at the date of such failure the time limited for the commencement of the action has expired, thus rendering applicable the statute authorizing the commencement of a new action within one year after the date of such failure, the plaintiff may cause the issuance and service of another summons in the same action upon the petition previously filed, or an amended petition, thereby commencing the action anew. *Id.*

9. Where a debt is payable in installments the statute of limitations runs upon the whole debt from the date of the first default only when such default has the effect, by the terms of the contract or otherwise, of maturing the whole debt. If the default does not mature the whole debt, then the statute will run from the date thereof, if at all, only upon the installment as to which the default has occurred. *Id.*
10. Under a provision in a trust deed or mortgage securing a debt payable in installments that upon any default the whole debt and interest may at once, at the option of the legal holder thereof, become due and payable, the option is solely for the creditor's benefit, and unless he exercises it, the statute of limitations runs on the debt only from the time of its maturity as originally fixed. *Id.*
11. It was provided in the by-laws of a mutual building and loan association that if any shareholder shall neglect to pay interest or dues on his loan, or the regular monthly installment, or other fees, for six months, the association may compel payment of principal, interest, fees, or dues by proceedings on his note, and foreclosing the mortgage or other security, which shall at once become due and payable. *Held*, that whether or not the provision matures the debt absolutely without an option at the time it takes effect, it is not to be construed as doing so until after a failure for six months to make the required payment. *Id.*

See also Appeal and Error, 31.

LIVE STOCK. See Animals; Carriers.

MANDAMUS.

1. The writ of mandamus will only issue in the sound discretion of the court, which means that the question whether it ought to issue depends upon the result of a judicial examination of the facts either as alleged or proven. *State ex rel. Sullivan et al. v. Schnitger, Secretary of State, 479.*

MANDAMUS—*Continued.*

2. To authorize mandamus the relators must show a clear legal right to which they are entitled, which is withheld or threatened to be withheld from them, and that it is the legal duty of the respondent to perform the act sought to be coerced, and that such performance can only be secured by means of the writ. *Id.*
3. If mandamus be not the proper remedy, or would be ineffectual to secure the right claimed, then it should not issue, since it would then be of no benefit. *Id.*
4. The right to the writ does not exist to coerce the performance of an illegal act. *Id.*
5. It is incumbent upon relators seeking the writ of mandamus to compel the election of members of the legislature in disregard of an apportionment act on the ground that the same is invalid, to show a prior valid apportionment to fall back to, and one under which the election of a valid and constitutional legislature can be held. Failing to do so, and thereby failing to show themselves entitled to the writ, the court is not called upon nor is it necessary to decide the constitutionality of the act assailed, which then becomes a mere abstract question. *Id.*

MARRIAGE.

1. In a proceeding to determine heirship, one claiming to be the widow of decedent testified that after the decedent and herself had lived together as man and wife for some time illicitly, a contract of marriage was entered into through the reading in their presence of the marriage ceremony of the Episcopal Church by one not authorized to perform the marriage ceremony, and each answering the questions appearing therein, but whether such questions were answered in the affirmative or negative was not stated; and when the claimant was asked as a witness if she then took the decedent as her husband and he took her as his wife, she testified, "We answered all the questions contained in the marriage ceremony of the Episcopal Church." *Held*, that such testimony was insufficient to establish a mutual contract of marriage, as the manner in which the ceremonial questions were answered could not be assumed. *Weidenhoft et al. v. Primm*, 340.
2. Though, where a man and woman live together, treating each other as man and wife, hold each other out to the world as such, and so conduct themselves toward each other and the

MARRIAGE—Continued.

- community as to gain therein a general and uniform reputation as being husband and wife, that is sufficient to create a presumption that they have been lawfully married, it does not directly or affirmatively establish a marriage. If satisfactorily proved and sufficiently strong, the facts may be legitimate ground for inferring a valid marriage. *Id.*
3. When the cohabitation between a man and woman is shown to have been illicit in the beginning, the presumption is that it continues to be illicit until the contrary is established. *Id.*
 4. The general reputation in the community where they reside as to whether or not a man and woman who have lived together are or were man and wife is competent evidence on the question of their marriage; but to be of any value as evidence, such reputation must be general and uniform. *Id.*
 5. The evidence held insufficient to establish an alleged common law contract of marriage between a decedent and a claimant to his estate as widow, where it appeared that their cohabitation was confessedly illicit in the beginning and continued so for some time prior to the alleged contract; that the claimant had been held out as the wife of decedent the same before as after the alleged contract; that, though claimant testified to a reading by her mother in their presence of the Episcopal marriage ceremony and their answering all the questions, she did not state how the questions were answered; that, notwithstanding decedent usually introduced claimant as his wife, they were not generally or uniformly reputed to be married in the community where they lived, but their relations were generally regarded as illicit; and other acts and declarations of the parties were shown inconsistent with a marriage contract. *Id.*

MUNICIPAL CORPORATIONS.

1. Where abutting property is damaged by a change in the grade of a street the owner's cause of action against the city is single and not separable, and hence the presentation by the owner of an itemized bill of such damages is to be construed as a presentation of the claimant's entire demand. *City of Rawlins v. Jungquist*, 403.

See also Accord and Satisfaction, 1-3.

NEGLIGENCE. See Carriers.

NEW TRIAL. See Appeal and Error, 24, 33.

NOTICE. When record of instrument acknowledged before disqualified officer will operate as constructive notice, see Chattel Mortgage, 2, 3.

OCCUPYING CLAIMANT.

1. A contract of sale made in excess of a special agent's limited authority does not entitle one in possession of real estate thereunder to the benefits of the occupying claimant's act as to compensation for improvements, in a suit by the owner to recover possession. *Brown et al. v. Grady*, 151.

OFFICE AND OFFICER. See Acknowledgment, 1-3; Animals; Chattel Mortgage, 2, 3; Deeds, 1; Insane Asylum, 1-5; Legislature, 10, 11.

PARTIES.

1. The code provision that any person may be made a defendant who has or claims an interest adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of a question involved, does not constitute every one referred to a necessary party to the rendition of a valid judgment; nor does it abolish the distinction between necessary and proper parties. *Field et al. v. Leiter et al.*, 1.
2. Those having or claiming an interest adverse to the plaintiff are necessary parties, while those merely necessary to a complete determination of a question involved are, as a rule, proper but not necessary parties. *Id.*
3. The statutory ground of demurrer that the plaintiff has no legal capacity to sue refers to legal disabilities, such as infancy and the like, and not that the plaintiff is without the necessary interest to sue in the particular action. *Littleton et al. v. Burgess*, 58.

Death and Substitution of. See Appeal and Error, 1, 2.

Defect of, Waiver. See Partition, 10.

In Injunction Contempts. See Injunction, 9-11.

In Partition. See Partition.

In Suit on Injunction Bond. See Injunction, 7.

PARTITION.

1. Unless otherwise provided by statute, a partition of estates held in remainder only without a present right of possession is not enforceable, nor can partition be compelled between a tenant in possession and mere remaindermen. *Field et al. v. Leiter et al.*, 1.

2. In the absence of a statute authorizing it, partition cannot be awarded either in equity or at law of an estate in reversion or remainder. *Id.*
3. Partition may be had between the life tenant of an undivided part and the owner in fee of the other part, at the suit of either. *Id.*
4. The common law in respect to the persons who may require or be compelled to suffer partition is not enlarged upon by the statute authorizing the remedy between tenants in common and co-parceners. *Id.*
5. A legal title whether in fee or for life to an undivided part, accompanied by possession or right of possession, entitles the owner to maintain partition against the owner of the remaining part holding the same as tenant in common with him. *Id.*
6. An action to compel partition is a civil action under the code. *Id.*
7. Partition under the code is not exclusively a legal or equitable proceeding. A particular action may be one or the other or a combination of both, depending upon the nature of the titles asserted and relief sought. *Id.*
8. The question of parties in partition depends upon the issues and the relief demanded. *Id.*
9. The rights of parties in an action for partition are determined by the order which finds them to be tenants in common, ascertains and adjudges the respective shares and orders a partition thereof, whether such order be deemed interlocutory or final. *Id.*
10. A defect of parties in partition not affecting the jurisdiction of the court is waived unless the objection is raised by demurrer or answer as required by the general code provision. *Id.*
11. In an action for partition between the parties to the suit, those parties only, and others, if any, virtually represented by them, will be bound by the proceedings and judgment. *Id.*
12. An executor's possession of real estate is only during and for the purpose of administration and not adverse to the heirs or devisees, and does not prevent the latter from maintaining a suit in partition against other tenants in common. *Id.*

PARTITION—*Continued.*

13. The owner in fee of an undivided part and the tenant for life of the other part being tenants in common, the former may maintain partition against the latter, at least where the property is capable of partition, without joining the remainderman who is not in possession nor entitled thereto, whether the estate in remainder be vested or contingent, and though the proceeding may not bind the remainder interest. *Id.*
14. The owner in fee of an undivided part conveyed to another in trust to pay the net income to the grantor during his life, and with power to manage and dispose of the property and to invest and re-invest proceeds; and provided in the deed that upon the grantor's death the trust should cease and that the estate then in the trustee's hands should vest in the grantor's children. The owner in fee of the other undivided part brought an action of partition against said trustee and his grantor, wherein the pleadings admitted the parties to be tenants in common, and the answer consented to partition. After the ordering of partition, and the report of commissioners partitioning the property, the proceedings were objected to as void because the children of the grantor in the trust deed, one of whom intervened and objected, had not been made parties. *Held*, on error from confirmation of report, that the trustee had at least the title of the life tenant; that the partition was not void for the want of necessary parties, but was valid and binding between the parties to the suit; and that it was not necessary to decide what the rights of the children in the property were, nor the effect of the joint consent of the trustee and life tenant to the partition order, nor the extent, if any, to which they represented and bound other parties. *Id.*
15. Whether the rule in such case would be different had the property been found incapable of partition, and its sale therefore necessary or an election to take at the appraised value, is not considered. *Id.*
16. The rejection of the report of partition commissioners is not justified on the sole ground of an omission to state the character and situation of the premises, or that they had been equitably and advantageously partitioned; the statute not expressly requiring the report to so state. *Id.*
17. The action of commissioners in partition will not be set aside on the ground of unequal allotments, except in ex-

PARTITION—*Continued.*

trema cases—as where the partition appears to have been made upon wrong principles, or where it is shown by clear and decided preponderance of the evidence that the partition is grossly unequal. *Id.*

18. Exceptions to the report of commissioners in partition on the ground of inequality in the allotments not being sustained by a clear preponderance of conflicting evidence, the fact that the dissatisfied party, pending the hearing of the exceptions, has offered to accept a different division, or to pay the other party for his share a sum exceeding the value set by the commissioners upon the part allotted to him, is not sufficient to vacate the partition; since, if the lands are capable of partition, a party is not compelled to sell his interest, whatever the price offered. *Id.*
19. It is imperative that the proceedings of commissioners in partition should be fairly conducted, with an equal opportunity to all parties to be heard; and a vacation of their report would be proper upon its appearing that secret or undue influence upon their action had been exercised by either party. *Id.*
20. The mere fact that the general manager for the contesting parties of the extensive property in controversy had accompanied the partition commissioners when they examined the various tracts, *held* not sufficient to cause a vacation of their report and partition, it not appearing that the manager had been present at any of the several deliberations of the commissioners, no specific act or statement of his being shown as having influenced the allotment, no intentional impropriety or prejudice appearing and the object of the commissioners and the manager as stated by them having been that the latter, as representing all the parties, might point out the property and assist merely in its examination. *Id.*
21. Where the parties to a suit for partition have consented by their pleadings to a partition of the premises described in the petition, without any suggestion that other tracts are also held in similar co-tenancy, an objection on the ground of the exclusion of such other tracts ordinarily comes too late after judgment and the report of the commissioners, especially so where there is no inherent objection to a separation of the different tracts. *Id.*
22. As against an objection first made after the filing of the report, the exclusion of scattering tracts of state lands

PARTITION—*Continued.*

held under lease and used to command a range for cattle in connection with a large body of ranch and hay lands owned by the parties, *held* not fatal to the partition of the latter, there being no inherent difficulty in making such partition separate from the leasehold premises. *Id.*

23. Defendant was not prejudiced by the fact that plaintiff's counsel prepared the report of the commissioners, where it was so prepared after the announcement by the commissioners of their conclusions in the presence of counsel for both parties, and their request thereupon that counsel prepare the report, and the report conformed in all respects with the conclusions previously announced, and, though furnished with a copy, defendant's counsel declined to make any suggestions respecting its contents. *Id.*

PARTNERSHIP. Mortgage of firm property, see Chattel Mortgage, 1, 4, 7.

PAYMENT. See Accord and Satisfaction; Limitation of Actions, 4; Vendor and Purchaser, 1.

PLEADING.

1. Where the sufficiency of a pleading is questioned for the first time by an objection to the introduction of evidence, the most liberal construction will then be adopted to sustain it, if possible, and such objection will not be sustained unless there is an entire omission of a material fact or a total failure to state a cause of action or defense. *City of Rawlins v. Jungquist*, 403.
2. As against an objection upon the trial of a cause to the introduction of evidence a pleading will not be held insufficient merely because it states a material fact in the form of a legal conclusion. *Id.*
3. As against an objection to the introduction of evidence, the defense of accord and satisfaction is held to have been sufficiently pleaded in an answer which alleged the allowance and payment by defendant of a part of plaintiff's claim as full compensation and that plaintiff accepted the same and thereby compromised and settled any and all claim which he might or did have against the defendant for the damages sued for, notwithstanding that the averment that plaintiff settled the claim by accepting the payment was stated in the form of a legal conclusion. *Id.*

See also Appeal and Error, 25; Carriers, 15; Injunction, 5, 6; Replevin, 1, 2; 7.

POLICE REGULATION. See Animals, 1.

PRACTICE.

1. It is not necessary in pronouncing judgment upon the issues between the parties to a suit to include therein a determination of its effect upon other designated persons. *Field et al. v. Leiter et al.*, 1.

See also Actions; Appeal and Error; Appeals from Justice Court; Criminal Law; Parties; Partition; Trial.

PRELIMINARY EXAMINATION. See Criminal Law, 1.

POWER OF ATTORNEY.

1. A power of attorney by non-resident partners to a resident and managing co-partner to execute chattel mortgages on the firm property to secure partnership debts then or thereafter existing, executed in 1891, recorded in 1896, under which a chattel mortgage was first executed in 1898, is not objectionable as a stale instrument or on the ground that its revocation was not negatived by proof; since the time of recording such an instrument is not limited by statute or rule of law, the power granted was a continuing one and not limited to a single transaction, the partnership had continued, and revocation by act of the parties during the continuance of the partnership is not to be presumed. *Boswell v. First National Bank*, 161.

See also Chattel Mortgage, 1; Evidence, 6.

PRINCIPAL AND AGENT.

1. One dealing with a special agent with limited authority is bound to know the extent of the agent's authority. *Brown et al. v. Grady*, 151.
2. An owner of real estate is not bound by a contract for its sale, not ratified by him, made by a special agent in excess of his limited authority. *Id.*
3. An agent was authorized to sell land for \$400 cash and four equal payments for the balance, the contract to provide for deed upon payment of second note, taxes and ditch stock being paid, the ditch stock not being sold and all assessments worked out. The agent's contract, executed in the owner's name, provided for a deed on payment of the first note, and without requiring as a condition the payment of taxes or ditch stock, or working out of assessments. *Held*, that the agent exceeded his authority, and the owner, not having ratified the sale, was not bound. *Id.*

PRINCIPAL AND AGENT—Continued.

4. A special agent with limited authority to sell real estate cannot bind the owner by the receipt of money upon a contract which he has no authority to make. *Id.*

See also Occupying Claimant, 1; Vendor and Purchaser, 1.

PRESUMPTIONS. See Accord and Satisfaction, 1; Acknowledgment, 9; Assault with Intent to Commit Rape, 6; Evidence, 6, 8; Marriage, 2, 3; Power of Attorney, 1; Replevin, 7.

PRINCIPAL AND SURETY. See Appeals from Justice Court, 4, 5.

PROHIBITION.

1. One of the principal purposes of the writ of prohibition is to prohibit an inferior court from proceeding in a cause over the subject matter of which it has no jurisdiction, and which, if proceeded in, may result in injury or damage for which the party has no adequate or complete remedy in the usual course of law. *Keefe et al. v. District Court of Carbon Co.*, 381.
2. Where, after a change of venue in a murder case and during its pendency in the court to which it was transferred, the court that granted the change is proceeding without jurisdiction to try the defendant for the same criminal act and offense upon a second information filed after the granting of the change, a writ of prohibition is proper to prevent such proceeding, as the remedy by proceedings in error would be neither complete nor adequate. *Id.*

QUARANTINE. Of Sheep, see Animals, 1-10.

RAILROADS. See Carriers.

RAPE. See Assault With Intent to Commit Rape.

RECEIVERS.

1. The evidence being conflicting as to whether a receiver, who was a stockholder of the concern placed in his charge, had agreed, in order to obtain the consent of the other stockholders to his appointment, to give his services as receiver without compensation, the finding of the trial court that he was entitled to compensation will not be disturbed. *Riordan et al. v. Horton et al.*, 363.
2. There being no statute fixing the fees or compensation of receivers, a statement filed by a receiver at the time of his appointment waiving the statutory fees and consenting to abide the order of the court or judge as to the amount of his compensation does not deprive him of the right to re-

RECEIVERS—Continued.

ceive any compensation, but, in connection with evidence that a supposed statutory fee of ten per cent was agreed by the receiver when appointed to be excessive, its effect is to limit the compensation to what may be reasonable and just, the same in no event to equal or exceed a commission of ten per cent. *Id.*

3. Though partial allowances from time to time for services rendered are proper, neither the whole nor any part of the compensation of a receiver accrues or becomes a charge upon his trust until the services have been rendered, and an order entered before final report showing a settlement of all matters intrusted to the receiver fixing the amount of his compensation as in full for all services rendered and to be rendered is premature, and therefore erroneous. *Id.*
4. A stockholder of a bank having been appointed receiver thereof, with the consent of the other stockholders, upon the understanding that when the work was completed the court would fix a reasonable fee for his services, which should depend as to amount upon the outcome of the bank's affairs, *Held*, that though such understanding would not preclude the court from allowing partial compensation from time to time for services rendered less than the value thereof, to allow him his entire compensation prior to his performance of the required services and the approval of his final report would be unfair to the stockholders, independent of the general rule forbidding an allowance before the services are performed. *Id.*

See also *Judicial Sales*, 1.

RECORD. On proceedings in error, see *Appeal and Error*, 13.

RECORDING ACTS. See *Acknowledgment*, 3; *Chattel Mortgage*, 5, 6.

RENTS AND PROFITS. See *Ejectment*, 1.

REPLEVIN.

1. In Wyoming replevin is not a local action, and the petition, therefore, need not allege a detention of the property in the county where suit is brought. *Boswell v. First National Bank*, 161.
2. A petition in replevin is not objectionable for alleging the detention to be "wrongful" instead of "illegal." If wrongful, the detention will be illegal or unlawful in the sense in which those words are applied to the detention of chattels from a plaintiff entitled thereto. *Id.*

REPLEVIN—*Continued.*

3. A mortgagee of chattels may maintain replevin upon default in the conditions of the mortgage, though he has never had actual possession. *Id.*
4. Where the mortgagor of chattels is permitted to continue in possession until default, or until the mortgagee shall elect to take possession, a demand is usually essential to render the possession of the mortgagor, or one claiming under him subject to the mortgage, wrongful. *Id.*
5. Where the original taking was not wrongful, a demand is as a rule necessary to put the right of possession in the plaintiff, but demand or proof thereof may be waived by the previous conduct or assertions of a defendant in possession, or his attitude in the suit showing that a demand would not have been complied with. *Id.*
6. Demand before suit is excused where it appears by the declaration, conduct, or claims of a defendant in replevin that it would not have been complied with. *Id.*
7. A claim made by a defendant in replevin either by the pleadings or upon the trial inconsistent with the supposition that he would have complied with a previous demand overthrows the presumption that the property would have been delivered upon demand, and renders proof of demand unnecessary. *Id.*
8. A claim of ownership by a defendant in replevin excuses proof by plaintiff of previous demand. *Id.*
9. Section 4158, Revised Statutes 1899, permitting an action of replevin to proceed as one for damages when the property has not been taken, or has been redelivered to defendant for want of an undertaking by plaintiff, does not apply where the defendant has obtained a redelivery upon his giving the undertaking provided for in Section 4151. *Id.*
10. The plaintiff's undertaking in replevin, when given, stands in the place of the property to the extent of defendant's interest, and the property passes into the exclusive possession and control of the plaintiff. *Id.*
11. The statute authorizing a defendant in replevin to regain possession upon giving a redelivery bond being silent as to verdict and judgment when plaintiff recovers in the action, the common law applies. *Id.*
12. The gist of the action in replevin is the wrongful detention, whether the original taking was lawful or unlawful. *Id.*

REPLEVIN—*Continued.*

13. Where property taken in replevin has been redelivered to the defendant upon his giving the statutory bond to deliver the property to plaintiff if that be adjudged, and to pay all costs and damages awarded against him, the judgment, when plaintiff recovers, should be in the alternative that he recover the property, or in case a delivery cannot be had, that he recover the value thereof. *Id.*
14. But where a judgment for a return of the property could not have been complied with because of defendant's sale of the property, or a part thereof, a judgment for plaintiff for the value of the property alone will not be disturbed on error. *Id.*

RES JUDICATA. See Partition, 11, 14.

ROBBERY.

1. The statute defining robbery is but a restatement of the offense at common law, and embraces all the common law elements of that offense. *McGinnis v. State*, 72.
2. An indictment or information for robbery is fatally defective which fails to state the ownership of the property alleged to have been taken, and charging the taking to have been "felonious" is not a substitute for an allegation of the ownership. *Id.*
3. An information or indictment for robbery failing to allege the ownership of the property taken, though the taking is alleged to have been felonious, is defective in substance, and the objection is not waived by not moving to quash, but can be raised by demurrer on the ground that the facts stated do not constitute an offense, and also by motion in arrest. *Id.*

SHEEP. Inspection and quarantine of, see Animals, 1-10.

SHEEP INSPECTOR. See Animals, 2-10.

SPECIAL FINDINGS. By jury, see Appeal and Error, 23; Carriers, 10, 11; Verdict, 1.

STALE INSTRUMENT. See Power of Attorney, 1.

STATUTE OF LIMITATIONS. See Limitation of Actions.

STATUTES.

1. It is not within the power of parties litigant to bind the court by an admission or stipulation that a statute is invalid. *State ex rel. Sullivan et al. v. Schnitger, Secretary of State*, 479.

For repeal of, see Legislature, 5.

STATUTES CITED OR CONSTRUED.

REVISED STATUTES OF 1887.

<i>Section</i>	<i>Subject</i>	<i>Page</i>
3025-3033....	Replevin	207, 208
3765....	Insane Asylum	247
3832....	Form of Tax Deed.....	122

LAWS OF 1888.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
90.....	Natrona County Created	505

LAWS OF 1890.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
47.....	Weston County	505
48.....	Big Horn County.....	505

LAWS OF 1890-91.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
70.....	Probate Procedure	351

LAWS OF 1897.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
43.....	Replevin	206

REVISED STATUTES OF 1899.

<i>Section</i>	<i>Subject</i>	<i>Page</i>
633, 634....	Charitable Institutions	243
650- 652....	Insane Asylum	247
1025....	County Government	88
1104....	County Attorneys	390
1107....	County Attorneys	65, 66
1172....	County Government	467
1188....	County Government	137
1861....	Taxation and Revenue	121
1896....	Taxation and Revenue	122
2074, 2076....	Live Stock	441
2087....	Live Stock	442, 445
2088....	Live Stock	442, 444, 445
2100....	Live Stock	444, 445
2695....	Common Law of England.....	263
2739....	Conveyances—Record as Evidence.....	187
2741....	Conveyances	188
2752....	Acknowledgment	188
2755....	Power of Attorney	187
2808....	Chattel Mortgages	179
2811, 2817....	Chattel Mortgages	198
2818....	Chattel Mortgages.....	197

STATUTES CITED OR CONSTRUED—*Continued.*

REVISED STATUTES OF 1899—(CONTINUED.)

<i>Section</i>	<i>Subject</i>	<i>Page</i>
3443	Form of Action	40
3453	Limitation of Actions	465
3454	Limitation of Actions	147, 465
3461	Limitation of Actions	466, 470
3462	Limitation of Actions	466, 467
3465	Limitation of Actions	465, 467, 469, 470
3466	Limitation of Actions	148
3480	Parties to Actions	33, 42, 45
3487	Parties to Actions	42
3505	Venue of Actions	192
3507, 3509, 3513	Commencement of Actions	467
3535, 3536, 3537	Demurrer	437
3612	Courts—Terms	263
3622-3638	Revivor of Actions	30
3657	Verdict	319
3736, 3737, 3738	Variance	329
4043	Injunctions	65, 67
4081-4088	Partition	39
4150-4151	Replevin	208
4150-4158	Replevin	207
4146, 4158, 4159	Replevin	192
4247, 4249	Proceedings in Error	113, 136
4289	Change of Venue	390
4401-4402	Appeals	111, 112
4408	Appeals from Justice Courts	115
4412	Appeals from Justice Courts	115
4542-4557	Probate Procedure	351
4551, 4552	Probate Procedure	352
4693	Probate Procedure	45
4835, 4836	Probate Procedure	349
4835-4840	Probate Procedure	352
4837	Probate Procedure	351
4838	Probate Procedure	353
4879-4883, 4884	Guardianship	246
4886	Guardianship	247
4894, 4895	Guardianship	239
4895	Guardianship	240, 244
4957, 4958	Crimes	294
4965	Crimes	295
5273	Informations	75
5300	Criminal Procedure	389
5301, 5302, 5307	Criminal Procedure	89

STATUTES CITED OR CONSTRUED—*Continued.*

REVISED STATUTES OF 1899—(CONTINUED.)

<i>Section</i>	<i>Subject</i>	<i>Page</i>
5317-5320...	Criminal Procedure	89
5318-5326...	Criminal Procedure	91
5326...	Criminal Procedure	75
5331...	Criminal Procedure	270
5336...	Criminal Procedure	390
5386...	Criminal Procedure	268
5418...	Criminal Procedure	76, 81
5498...	Habeas Corpus	266

LAWS OF 1901.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
28.....	Proceedings in Error.....	372
79.....	Inspection of Horses.....	339

LAWS OF 1903.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
32.....	Justice of the peace.....	111

LAWS OF 1905.

<i>Chapter</i>	<i>Subject</i>	<i>Page</i>
98.....	Inspection of Sheep.....	441, 442

STATUTORY CONSTRUCTION. See Criminal Law, 3.

STREETS. See Accord and Satisfaction, 1, 3; Municipal Corporations, 1.

SUMMONS. See Writ and Process.

SUNDAY. Discharge of jury on, see Habeas Corpus, 12.

SUPREME COURT. See Divorce, 1, 2; Habeas Corpus, 7.

TAXATION. See Deeds, 2; Limitation of Actions, 1.

TAX DEED. See Deeds, 2; Limitation of Actions, 1.

TENANTS IN COMMON. See Partition.

TRIAL.

1. The "scintilla of evidence rule" is not a safe criterion in determining when a verdict may be directed, since it fails to carefully discriminate between the prerogatives of the court and jury, and requires the submission of evidence which might afford no reasonable justification for a verdict. *Boswell v. First National Bank*, 161.

TRIAL—Continued.

2. In determining the propriety of directing a verdict, the rule is to be considered that a question of fact must be passed upon by the jury, and a question of law by the court, and that the credibility of witnesses and weight of conflicting testimony are questions of fact. *Id.*
 3. Where the question upon uncontradicted evidence is one of law as to the right of a party to recover a verdict may be directed. *Id.*
 4. Where upon a claim of fraud, the testimony of *bona fides* is undisputed, a verdict is properly directed. *Id.*
- See also Chattel Mortgage, 7; Criminal Law, 7; Jury, 1-3; Replevin, 9-14; Verdict.

VENDOR AND PURCHASER.

1. The owner's terms of sale of real estate required among other things a first payment of \$400 in money. The agent contracted to sell upon unauthorized terms, and reported to the owner the deposit upon such sale of \$400 in a bank to be paid over to the owner when his title deeds were returned to the bank with a duly executed bond for deed, and his title was found to be good, *Held*, (1) that the money was not paid to or received by the agent for the owner, but was deposited in bank upon certain conditions; (2) that the transaction between the agent and his purchaser amounted only to an offer by the latter to buy on certain terms. *Brown et al. v. Grady*, 151.

VENUE. See Jurisdiction, 1; Prohibition, 2; For review of order denying change, see Appeal and Error, 3.

VERDICT.

1. A motion for judgment upon a special finding of facts returned with a general verdict is properly denied, unless there is such an inconsistency between the special findings and general verdict as to render them irreconcilable. *Chicago, Burlington & Quincy Railroad Company v. Morris*, 308.

See also Trial, 1-4.

WITNESSES. See evidence, 9.

WORDS AND PHRASES.

Ratios. In Constitution relating to legislative apportionment, *State ex rel. Sullivan et al. v. Schnitger*, 479.

. WRIT AND PROCESS.

1. To have the effect of failing to give jurisdiction a summons or the service thereof must be so radically defective that it would authorize a collateral impeachment of a judgment rendered thereon. *Clause, Adm'r, &c., v. Columbia Building & Loan Ass'n*, 450.
2. The coroner being authorized to serve process where the sheriff is a party to the action, the service by him of a summons will not render the judgment void and thus throw it open to collateral impeachment, although it may have been irregular and a ground for quashing service upon objection that the sheriff was improperly joined as a party defendant. *Id.*

658
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